Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

Petitioner,

vs.

BRUCE E. BABBITT, Secretary of the Interior; the UNITED STATES OF AMERICA; EVELYN C. FOSTER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did *Block v. North Dakota*, 461 U.S. 273 (1983), eliminate the *ultra vires* exception to sovereign immunity in cases filed under the Quiet Title Act, 28 U.S.C. § 2409a?

2. Does *Block v. North Dakota*, 461 U.S. 273 (1983) preclude judicial review of unconstitutional or statutorily unauthorized agency action involving the creation of trust or restricted Indian lands?

3. Does the federal government have a colorable claim of Indian land title within a material site grant issued under the Highway Act of 1958, 23 U.S.C. § 317, before Indian occupancy was initiated?

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PETITION FOR A WRIT OF CERTIORARI

The State of Alaska requests that a Writ of Certiorari issue to review the final judgment entered in this proceeding by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's decision is reported as *State of Alaska v. Babbitt [Foster]*, 67 F.3d 864 (9th Cir. 1995), *amended on denial of rehearing*, 75 F.3d 449 (9th Cir. 1996), *amended further on denial of rehearing*, 1996 WL 118495 (9th Cir. March 19, 1996) ("*Foster*"); App. 1a-32a.[1] The opinion of the district court is unpublished. App. 33a. The decision of the Interior Board of Land Appeals is reported as *State of Alaska*, 125 IBLA 291 (1993), App. 40a.

JURISDICTION

The Ninth Circuit entered its judgment on October 5, 1995. App. 23a. On January 11, 1996 the court denied

[1] The second amended opinion in *Foster* was separately published at 1996 WL 118495 (9th Cir. Mar. 19, 1996). Upon the court's second amendment of the opinion, 1996 WL 118495 was withdrawn and the January 11, 1996 *Foster* opinion changed to reflect the Ninth Circuit's March 19, 1996 amendments. As a result, the January 11, 1996 version of the *Foster* opinion is now unpublished. The original January 11, 1996 version is included in the appendix to this petition at App. 13a-22a.

Alaska's petition for rehearing, rejected Alaska's suggestion for rehearing en banc and amended its opinion. App. 13a. The court permitted the filing of a petition for rehearing on its amended opinion. App. 14a. On March 19, 1996, the court denied Alaska's second petition for rehearing, rejected Alaska's second suggestion for rehearing en banc and again amended its opinion. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

23 U.S.C. § 317

28 U.S.C. § 2409a

43 U.S.C. §§ 270-1, 270-3

STATEMENT

This petition arises out of an action brought by the State of Alaska for judicial review of the decision of the Interior Board of Land Appeals (IBLA) in *State of Alaska*, 125 IBLA 291 (1993). App. 40a. The IBLA affirmed the revocation by the Bureau of Land Management (BLM) of an amended highway right-of-way grant issued to Alaska by the BLM in 1969. The amended highway grant conflicted with a Native allotment claim filed in 1971 by Evelyn Foster. The statutory basis of subject matter jurisdiction in the district court is 43 U.S.C. § 1632(a), 5 U.S.C. § 702, 28 U.S.C. § 1331, and 28 U.S.C. § 2409a.

The Highway Act of 1958, 23 U.S.C. § 317, provides for the transfer of rights in public land from the federal

government to a State for highway purposes. Congress deems a Highway Act transfer to be an "appropriation" of public lands. 23 U.S.C. § 317(a); App. 68a.

In 1961 the BLM issued a Section 317 material site right-of-way to the State of Alaska. App. 71a. In 1962 BLM granted Alaska a highway right-of-way in the vicinity of its 1961 material site grant. App. 74a. The highway right-of-way grant was amended in 1969 because of a change in alignment of a portion of the original 1962 right-of-way. *State of Alaska*, 125 IBLA at 292; App. 42a. The Parks Highway was constructed within the amended highway grant between 1969 and 1971 and is the primary road connection between Anchorage and Fairbanks, Alaska's two largest cities. App. 42a.

In 1971 Evelyn Foster applied for a Native allotment under the Alaska Native Allotment Act, 43 U.S.C. § 270-1 (now repealed). App. 69a-70a, 84a. The Allotment Act provides that Alaska Natives may apply for up to 160 acres of "vacant, unappropriated, unreserved nonmineral land" in Alaska. 43 U.S.C. § 270-1; App. 69a. In 1972 Foster amended the land description in her application. *State of Alaska*, 125 IBLA at 292; App. 42a-43a. As a result of this amendment, Foster's allotment claim overlapped a portion of Alaska's 1969 amended highway right-of-way which, in turn, is located entirely within Alaska's 1961 material site. App. 101a.[2] Foster's allotment application claims that she began using the land on a seasonal basis in 1964 for hunting and berry picking. App. 85a. She

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[2] App. 101a is a color coded map of the interests in the disputed land.

claimed no improvements on the land. The allotment application does not mention the highway which had been constructed before Foster filed her application.

On February 26, 1979 the BLM approved Foster's allotment except for 8 acres. App. 63a. The 1979 BLM decision did not mention Alaska's 1969 amended highway right-of-way, although the existence of Alaska's 1961 material site and another grant not at issue in this case were noted. App. 64a. Under then-existing BLM policy, Foster's allotment was to be made subject to Alaska's 1961 material source and Alaska's 1969 amended highway grant. This policy is reflected in part in a 1963 regional solicitor's opinion advising the BLM that it had the authority to issue highway rights-of-way over land that was subject to an allotment application. App. 77a. This policy remained in effect until 1987 when BLM reversed it. *GVEA (On Reconsideration)*, 98 IBLA 203, 207 and n.1 (1987). Following the *GVEA (On Reconsideration)* decision, the IBLA began retroactively applying its changed policy to cancel Alaska's rights-of-way, as will be explained below.

On December 7, 1979 BLM issued a second decision rejecting State selections of the disputed land based on Foster's prior occupancy. App. 59a. That decision neither mentioned nor took action against Alaska's Section 317 grants.

On March 1, 1989 the BLM issued a third decision stating, *inter alia*, that Foster's allotment was subject to Alaska's 1961 material site and its original 1962 highway right-of-way. No mention was made of the 1969 amended right-of-way which carried the same grant number. App.

53a. On April 24, 1989 the BLM clarified its March decision ruling that the allotment was subject to the 1962 highway grant, but not the 1969 amended grant, because Foster claimed she began using the land in 1964. App. 50a. As a result, BLM canceled the 1969 grant.

The IBLA affirmed the cancellation of Alaska's 1969 highway grant on March 9, 1993. *State of Alaska*, 125 IBLA 291; App. 40a. The Board held that administrative finality of the BLM's February 1979 and March 1989 decisions barred consideration of the issues related to the sufficiency of Foster's use and occupancy. *Id.* at 293; App. 45a.

Alaska filed a complaint for judicial review of the IBLA decision. App. 87a. The federal defendants claimed that judicial review was barred by the Indian land exception to the waiver of sovereign immunity found in the Quiet Title Act, 28 U.S.C. § 2409a(a) ("QTA"). App. 34a-35a. Alaska invoked the *ultra vires* exception to sovereign immunity, arguing that the Secretary's approval of Foster's allotment violated the Allotment Act. The district court dismissed the complaint. App. 38a-39a. Alaska appealed the dismissal to the Ninth Circuit. Before the Ninth Circuit, Alaska alleged that the Secretary's revocation of Alaska's amended highway right-of-way was based on an unconstitutional and statutorily unauthorized agency approval of Foster's allotment.

The Ninth Circuit affirmed the dismissal of Alaska's action for judicial review after twice amending its opinion in response to Alaska's petitions for rehearing. App. 1a, 13a, 23a. The Ninth Circuit held that the *ultra vires* exception was vitiated by this Court in its decision in *Block v. North Dakota*, 461 U.S. 273 (1983). *Foster*, 75 F.3d at

453. The Ninth Circuit did not address Alaska's constitutional claim.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit now holds that the courts of the United States have no jurisdiction to review unconstitutional or statutorily unauthorized agency action related to Indian land. The *Foster* decision places the Ninth Circuit in direct conflict with the Eighth and Eleventh Circuits on the issue of the reviewability of *ultra vires* or unconstitutional Indian land decisions. Therefore, whether a State can obtain review of an unconstitutional or unauthorized Indian land decision now depends upon the federal circuit in which the State is located. This is an issue of national significance which should be settled by this Court.

I. *Block v. North Dakota* did not eliminate the *ultra vires* exception to sovereign immunity in the QTA context.

Prior to the passage of the QTA in 1972, plaintiffs with land disputes involving the United States were often thwarted in their attempts to judicially vindicate their claims because the United States had not waived its immunity from suit in such cases. *Block v. North Dakota*, 461 U.S. 273, 280-81 (1983). As this Court explained in *Block*, some plaintiffs were successful in circumventing the immunity of the United States through a pleading artifice known as an "officer's suit." In the typical officer's suit a federal official in charge of the disputed land

would be named as a defendant in an action for mandamus or ejectment rather than naming the United States as a defendant in a quiet title action. *Id.*

The officer's suit approach to circumventing sovereign immunity in land disputes met with some success but was severely curtailed in *Malone v. Bowdoin*, 369 U.S. 643 (1962). In *Malone*, this Court stated:

> [T]he action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.'

369 U.S. at 647, *quoting Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949). Thus, under *Malone*, officer's suits were generally not permitted. However, as the above-quoted portion of *Malone* demonstrates, this Court recognized a limited exception to the bar of sovereign immunity for those cases where a federal officer acted unconstitutionally or without statutory authority with respect to real property. Congress enacted the QTA in 1972 in response to *Malone's* restrictive holding. *Block*, 461 U.S. at 282. The QTA waived the immunity of the United States from suits concerning real property except for "trust or restricted Indian lands." 28 U.S.C. § 2409a(a).

In *Block v. North Dakota*, the State of North Dakota brought an officer's suit against several federal officials under the mandamus statute. The suit sought an order requiring the federal officials to cease exercising control over a river bed to which the State laid claim. 461 U.S. at

278. This Court was asked to decide whether "Congress intended the QTA to provide the exclusive procedure by which a claimant can judicially challenge the title of the United States to real property." *Id.* at 276-77. The question was answered in the affirmative. *Id.* at 286. In the course of coming to that conclusion, this Court discussed its earlier decisions in *Larson* and *Malone*, *id.* at 281-82, but neither limited nor overruled the *Larson-Malone* exception to sovereign immunity where the government acts *ultra vires*.

The discussion of *Larson* and *Malone* in *Block* is central to the dispute in the case now before this Court. *Block's* holding that the QTA provides the "exclusive means" for challenging land title against the United States is interpreted by the Ninth Circuit as eliminating the *ultra vires* or *Larson-Malone* exception to sovereign immunity in the quiet title context. According to the Ninth Circuit:

> The Supreme Court has made it clear that suits alleging "ultra vires" acts, actions that are outside the scope of a government officer's authority or are unconstitutional, are a subgroup of officer's suits as a whole. See *Block*, 461 U.S. at 281-82; *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 687-90 (1949). Though such "ultra vires" suits regarding federal claims to land may have been permissible prior to the QTA under *Larson* and *Malone v. Bowdoin*, 369 U.S. 643 (1962), the *Block* court "applied the rule that a precisely drawn, detailed statute pre-empts more general remedies," *Block*, 461 U.S. at 285, in finding that the QTA dictated the exclusive means by which a challenge to the United State's [sic] title to land could be brought. Thus,

> the Court has specifically proscribed officer's suits, including "ultra vires" suits, as a means of divesting the government's sovereign immunity in quiet title actions relating to trust or restricted Indian land.

Foster, 75 F.3d at 452-53 (parallel citations omitted). Under the Ninth Circuit's analysis of *Block*, a federal agency decision regarding Indian land is immune from judicial review under the QTA even if the agency decision violates constitutional or statutory limitations on the agency's authority to take land into trust.

The Ninth Circuit's misinterpretation of the *Block* decision is apparent from the context of this Court's holding in that case. At issue in *Block* was the applicability to a State of the QTA's 12-year statute of limitations. *Id.* at 279. North Dakota did not claim in *Block* that federal officials acted unconstitutionally or beyond their statutory powers. 461 U.S. at 278. Rather, North Dakota's suit assumed that the actions of federal officials were both authorized by statute and constitutional if applied to land which was owned by the federal government.[3]

Block held that the QTA provided the "exclusive means" for challenging the federal government's land title and thus applied the 12-year statute of limitations to the State. 461 U.S. at 286. However, *Block* did not hold that the QTA gave federal agencies immunity from timely

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[3] Alaska does not challenge the government's title to the disputed land in this case. Rather, Alaska disputes the cancellation of its highway grant on the basis of Interior's decision to convey public land to an Alaska Native in an unconstitutional and statutorily unauthorized fashion.

filed actions that challenge unconstitutional or statutorily unauthorized agency decisions. The Supreme Court simply did not have a claim of unconstitutional or statutorily unauthorized agency action before it in *Block*.

Precluding judicial review of unconstitutional or unauthorized agency action on the basis of *Block* turns constitutional law on its head. The Ninth Circuit's decision in *Foster* gives primacy to agency decisions over both constitutional and congressional limitations on the agency's authority to dispose of public land. The Supreme Court never intended *Block* to be interpreted in this fashion.

In fact, in footnote 23 of the *Block* decision, this Court recognized that Congress' clear intent to limit suits under the QTA was itself subject to constitutional strictures. 461 U.S. at 286 n.23. Although *Block* holds that Congress was subject to constitutional limitations in enacting the QTA, the Ninth Circuit surprisingly concluded in *Foster* that the Secretary is free to ignore both statutory and constitutional limitations on his power when ostensibly applying the Allotment Act, 43 U.S.C. § 270-1.

The Ninth Circuit has long held that "Congress did not intend to give unfettered discretion to the Secretary" under the Allotment Act. *Pence v. Kleppe*, 529 F.2d 135, 140 (9th Cir. 1976). Nevertheless, the Ninth Circuit now vests the Secretary with unfettered discretion to cancel the State's highway grants under the guise of Allotment Act approvals although the Secretary violates both the Act and the Constitution in the process. The decision in *Foster* sets the whim of an executive branch official above the

enactments of Congress that are designed to regulate the disposal of public lands to Alaska Natives.

a. *Ultra vires* suits are not officer's suits.

The Ninth Circuit's conclusion that *Block* eliminated the *ultra vires* exception in quiet title suits flows from the incorrect premise that suits alleging *ultra vires* action by a federal official are a "subgroup" of officer's suits. *Foster*, 75 F.3d at 452. In fact, there is a significant distinction between officer's suits and suits alleging *ultra vires* conduct.

Officer's suits avoid naming the United States as a party in cases where the United States is the real party in interest. *Block*, 461 U.S. at 281. By contrast, the immunity of the United States is not implicated in suits alleging *ultra vires* conduct on the part of a federal agency or official. This is so because " 'the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign.' " *American Policyholders Ins. Co. v. Nyacol Products, Inc.*, 989 F.2d 1256, 1265 (1st Cir. 1993), *cert. denied sub nom. Keough v. American Policyholders Ins. Co.*, ___ U.S. ___, 114 S.Ct. 682 (1994), *quoting Larson*, 337 U.S. at 690.

A suit alleging *ultra vires* action against a federal agency claims that the agency action is unconstitutional or outside of the scope of the agency's statutory authority. Alaska's complaint in *Foster* contained no pleading artifice to avoid naming the United States. The United States was named as a defendant along with the Secretary of the Interior in his official capacity. App. 88a-89a.

A QTA suit alleging *ultra vires* action is not prohibited simply because it names a federal officer as a defendant acting in his or her official capacity. The controlling factor for purposes of immunity is whether the action complained of is statutorily unauthorized or unconstitutional, and thus not the action of the sovereign. Where the conduct of a federal official is unconstitutional or beyond the scope of that officer's authority, the actions of that official are not the actions of the United States. Sovereign immunity does not bar a suit seeking judicial review of such action. *Florida v. U.S. Dep't of Interior*, 768 F.2d 1248, 1251-52 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). The Ninth Circuit erred in equating *ultra vires* suits with the officer's suits prohibited under *Block*.

b. Lower federal courts, including the Ninth Circuit, have recognized the continuing vitality of the *ultra vires* exception in quiet title cases decided after *Block*.

Shortly after *Block* was decided, the First Circuit concluded that the "well-established" *ultra vires* exception to sovereign immunity set forth in *Larson* and *Malone* remained "good law." *Kozero v. Spirito*, 723 F.2d 1003, 1008 (1st Cir. 1983). Noting the *Block* decision, *Kozero* applied the *ultra vires* exception and asserted jurisdiction over a suit challenging the enforcement of an allegedly unconstitutional statute by the Secretary of Health and Human Services. *Id.* at 1007-08. Although *Kozero* was not a quiet title action, the First Circuit's application of the *ultra vires* exception after *Block* demonstrates that the lower federal courts did not understand *Block* to overrule or limit *Larson* and *Malone*.

The Ninth Circuit explicitly recognized the availability of the *ultra vires* exception in the quiet title context after *Block* in *Donnelly v. United States*, 850 F.2d 1313 (9th Cir. 1988), *cert. denied sub nom. Donnelly v. Eklutna, Inc.*, 488 U.S. 1046 (1989). *Donnelly* held that the APA conferred jurisdiction to review an agency decision affecting real property where *ultra vires* conduct was alleged, despite the strictures of the QTA.

In *Donnelly*, the plaintiffs raised *ultra vires* claims against the United States and the Secretary of the Interior concerning homestead title. The Donnellys alleged that "administrative wrongdoing" arising from "the Secretary's unjustified failure to obey" the Federal Power Act "wrongfully prevented them from establishing title" to the disputed land. 850 F.2d at 1313, 1318.[4]

While acknowledging that the QTA provides an "exclusive remedy" for determining real property disputes with the federal government, *Donnelly* held that the QTA did not preclude judicial review of *ultra vires* agency action. *Donnelly* distinguished *Block* on the basis that "no independent administrative wrongdoing [i.e., no *ultra vires* action] was alleged in *Block*", while such wrongdoing was at the heart of the Donnellys' claims. *Id.* at 1318.

> We do **not** hold . . . that the Quiet Title Act constitutes the exclusive source of **jurisdiction** for ***all*** claims against the United States involving the United States' disposition of public lands

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[4] The Donnellys alleged the Secretary acted beyond his statutory power. Government officials act *ultra vires* if they exceed "their statutorily derived authority." *State of Alaska v. Babbitt [Albert]*, 38 F.3d 1068, 1076 n.7 (9th Cir. 1994).

> . . . . The Administrative Procedure Act provides jurisdiction in cases of administrative wrongdoing.

Id. at 1317-18, *quoting Lee v. United States* , 809 F.2d 1406, 1409 n.2 (9th Cir. 1987), *cert. denied sub nom. Lee v. Eklutna*, 484 U.S. 1041 (1988) (emphasis added, italics in original). The Ninth Circuit expressed no concern that the Donnellys' claim was leveled against federal officials, thus making it an "officer's suit". Rather, the Ninth Circuit affirmed the continuing vitality of the *ultra vires* exception after *Block* and, in fact, distinguished *Block* on the basis that no allegation of *ultra vires* conduct had been raised in that case. *Id.* at 1318.

Thus, in *Donnelly*, the Ninth Circuit exercised jurisdiction under the APA to review *ultra vires* conduct of federal officials in a QTA context. Neither the QTA nor the "exclusive means" language of *Block* were interpreted to foreclose judicial review of unconstitutional or statutorily unauthorized agency action. To the contrary, it was the allegation of statutorily unauthorized agency action that formed the basis for jurisdiction in *Donnelly*.

Six years after *Donnelly*, in *State of Alaska v. Babbitt [Albert]*, 38 F.3d 1068 (9th Cir. 1994), the Ninth Circuit affirmed the availability of the *ultra vires* exception as a separate source of jurisdiction for judicial review of agency action, this time in a suit involving alleged Indian land.

> This court has long recognized that sovereign immunity does not bar an action for judicial review of an agency decision where (1) the government officer's powers are limited by statute

> and his actions are ultra vires, or (2) the officer acts unconstitutionally or pursuant to an unconstitutional grant of power from the sovereign. *Washington v. Udall*, 417 F.2d 1310, 1314 (9th Cir. 1969).

38 F.3d at 1076. As in *Donnelly*, the Ninth Circuit explicitly recognized in *Albert* that "the QTA is the 'exclusive means by which adverse claimants [can] challenge the United States' title to real property.' " *Id.* at 1073, *quoting Block*, 461 U.S. at 286. Yet, the court also recognized that the *ultra vires* exception would have permitted review of the agency decision in *Albert* if there had been "evidence that agency officials exceeded their authority". *Id.* at 1076 n.7.[5]

The Ninth Circuit also recognized the availability of the *ultra vires* exception in Indian land disputes in its initial opinion in *Foster*:

> An official's actions that allegedly are taken pursuant to an unconstitutional statute, or allegedly unconstitutional actions taken pursuant to a constitutional statute, are subject to a *per se* divestiture of immunity.

Foster, 67 F.3d 864, 867 n.3 (9th Cir. 1995) (citation omitted). Alaska demonstrated in its petition for rehearing of that opinion that the court had overlooked the principal evidence supporting Alaska's allegation of *ultra vires* action by the Secretary. Alaska also demonstrated that the agency had acted contrary to the Property Clause of the

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[5] The court in *Albert* held that Alaska had not alleged *ultra vires* conduct. Thus, the court was without jurisdiction to review the agency decision. 38 F.3d at 1076.

Constitution. It was only then, in response to Alaska's petition, that the Ninth Circuit held that *Block* eliminated the *ultra vires* exception in the quiet title context. App. 19a.

II. The holding in *Foster* is in conflict with decisions from the Eighth and Eleventh Circuits.

The Ninth Circuit's decision in *Foster* is in conflict with decisions in the Eighth and Eleventh Circuits. In the Eighth and Eleventh Circuits the *ultra vires* exception provides a limited but entirely separate source of jurisdiction for judicial review of Indian land agency decisions if those decisions are unconstitutional or statutorily unauthorized.

In *Florida v. U.S. Dep't of Interior*, 768 F.2d 1248,[6] the Eleventh Circuit stated that:

> As a threshold matter **in any case** in which sovereign immunity is invoked, we **must first determine** whether the suit is one against the United States as sovereign.

Id. at 1251 (emphasis added). The court explained that

> an assertion of governmental authority [to acquire property in an unconstitutional manner] is not insulated from challenge in the courts, **because when government officials exceed their authority their actions are not authorized by the sovereign.** In such instances, a lawsuit

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[6] This post-*Block* decision was cited by the Ninth Circuit in both of its amended opinions. *Foster*, App. 20a; *Foster*, 75 F.3d at 453.

> can be maintained against the officials in their individual capacity, without sovereign immunity barring the way. . . . Subsequent cases make clear that this exception from immunity applies only where the action is challenged as not one of the sovereign **because it is alleged to be either unconstitutional or beyond the government agency's statutory authority.**

Id. at 1251-52 (emphasis added) (citations omitted). The court went on to hold that Florida's action was barred under the QTA's Indian land provision, not because the *ultra vires* exception was vitiated by *Block*, but because Florida did not mount a constitutional or statutory authority challenge against the Secretary's decision. *Id.* at 1252. In fact, *Florida* recognized that there is jurisdiction to review Indian land title disputes where constitutional or statutory authority challenges are raised. *Id.* at 1255 n.9, *citing City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465 (D.D.C. 1978). Thus, the Eleventh Circuit interprets neither *Block* nor the QTA to divest the court of jurisdiction in the Indian land context where an agency's action is alleged to be unconstitutional or beyond its statutory powers.

In *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) the Eighth Circuit applied the *ultra vires* exception and held it had jurisdiction to review a secretarial decision that took land into trust for an Indian tribe. The district court had dismissed the action on the basis of the QTA's Indian land exception. *Id.* at 880-81. The Eighth Circuit held that it did not need to consider the QTA because it found that the Secretary had acted pursuant to an unconstitutional statute. *Id.* at 881 n.1, *quoting Florida*, 768 F.2d at 1255 n.9. Thus, the court

applied the *ultra vires* exception to review the Secretary's decision even though Indian trust land was involved.

Alaska alleges that the Secretary violated the Property Clause of the Constitution and the Allotment Act when he approved a Native allotment on mineral land appropriated to Alaska before Foster began her use of the land. In the Eighth and Eleventh Circuits these allegations remove the sovereign immunity bar to judicial review. In the Ninth Circuit, the Secretary is free to make unconstitutional and statutorily unauthorized decisions concerning Indian land without fear of judicial review. This Court should resolve the conflict between the circuits created by the Ninth Circuit's decision in *Foster*.

III. The Secretary's decision approving Foster's allotment was statutorily unauthorized.

Under the Alaska Native Allotment Act, Congress expressly limited the Secretary's authority to issuance of allotments on "vacant, unappropriated, and unreserved nonmineral land in Alaska." 43 U.S.C. § 270-1; App. 69a. Alaska's 1961 material site right-of-way was issued under the 1958 Highway Act, 23 U.S.C. § 317; App. 68a. Under that statute, Congress made available to the States "the lands or interests in lands owned by the United States" that are reasonably needed for the construction and maintenance of highways. 23 U.S.C. § 317(a); App. 68a. Under 23 U.S.C. § 317(b), Congress mandated that the land and materials necessary for highway construction were to be "**appropriated and transferred** to the State highway department." App. 68a. (Emphasis added) The interest so transferred remains permanently vested in the State until

"the need for any such lands or materials for such purposes shall no longer exist," at which time they "immediately revert" to the United States. 23 U.S.C. § 317(c); App. 68a.

The disputed land in this case was mineral land that was statutorily appropriated to Alaska under 23 U.S.C. § 317 in **1961**.[7] Foster did not begin using the disputed land until **1964**. The Secretary has no statutory authority to approve allotments on appropriated mineral lands in Alaska and has long recognized this limitation on his authority.

> Congress in the Alaska Native Allotment Act chose to recognize some forms of Native occupancy as an entitlement to allotment and not to recognize others. Its authority to so legislate is unquestioned.

Myrtle M. Jensen Shanigan, 29 IBLA 255, 256 (1977) *citing Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279-80 (1955). "Departmental rules require a Native allotment applicant to describe vacant, unappropriated, and unreserved non-mineral lands. . . . " *Leo Titus, Sr.*, 89 IBLA 323, 330 (1985).

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[7] The land was considered mineral land in 1961 because the purpose of the grant was for use as a highway material source. Land valuable for sand and gravel was recognized as mineral land at that time. *Ahtna, Inc.*, 100 IBLA 7, 17-18 (1987). In construing Alaska's material site grant "the law in force at the time the grant is made governs." *Myers v. United States*, 378 F.2d 696, 702 (Ct.Cl. 1967).

When Foster filed her allotment application in 1971, the land within Alaska's 1961 material site was not unappropriated nonmineral land as required by the Allotment Act. Rather, the disputed land was mineral land that had been appropriated and transferred to Alaska under 23 U.S.C. § 317 in 1961. The Parks Highway is located within the 1961 material site where Foster's allotment overlaps the highway grants. App. 101a. Since Congress had declared appropriated mineral lands to be unavailable for allotment under the Allotment Act, it was *ultra vires* for the Secretary to approve Foster's application where it conflicted with Alaska's material site.

IV. The Secretary's decision approving Foster's allotment was unconstitutional.

Alaska's claim that the Secretary acted outside of his authority in approving Foster's allotment raises a constitutional issue. The Property Clause of the U.S. Constitution, art. 4, § 3, cl. 2, commits to Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." App. 67a. The Supreme Court holds that

> the power of Congress [under the Property Clause] is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired.

Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917). "Thus neither the courts **nor the executive agencies**, could proceed contrary to an Act of Congress in this congressional area of national power." *United States v. State of California*, 332 U.S. 19, 27 (1947) (emphasis added).

The Secretary proceeded contrary to an Act of Congress by approving Foster's allotment on land that was both appropriated and mineral in character where Congress limited allotments to **unappropriated, nonmineral** lands under the Allotment Act. For this reason, the Secretary's approval of Foster's allotment where it conflicted with Alaska's material site was unconstitutional. The cancellation of Alaska's amended highway grant was based on the *ultra vires* approval of Foster's allotment. Therefore, the cancellation of the amended grant was likewise unconstitutional and statutorily unauthorized. The Secretary is divested of his immunity.

V. Neither the QTA nor the Allotment Act evidence a congressional intent to exclude review of constitutional claims.

There is a "strong presumption that Congress did not mean to prohibit all judicial review" of agency action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 (1986) (inner quotes and citation omitted). In *Webster v. Doe*, 486 U.S. 592 (1988) the Supreme Court held that the APA confers jurisdiction to review constitutional claims raised in challenges to agency decisions even though those decisions are committed to the sole discretion of an agency official.

> [W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.

486 U.S. at 603 *citing Bowen*, 476 U.S. at 681, n.12; *Weinberger v. Salfi*, 422 U.S. 749 (1975).

In *Webster*, this Court examined § 102 of the National Security Act (NSA) and concluded that, although § 102 "fairly exudes" deference to the CIA Director's decisions, the APA conferred jurisdiction to review the plaintiff's constitutional claims. *Id.* at 600. The Court concluded that "[n]othing in § 102(c) persuades us that Congress meant to preclude consideration of colorable claims arising out of the actions of the Director pursuant to that section." *Id.* at 603.

Likewise, nothing in the Allotment Act or in the QTA evidences a congressional intent to preclude review of the constitutionality of an agency's decision to take land into trust for Alaska Natives. The Allotment Act grants the Secretary limited discretion to approve Native allotment applications. *Pence*, 529 F.2d at 140. However, it is silent with regard to judicial review.

The QTA excludes Indian land from the waiver of immunity. However, the QTA contains no evidence of a congressional intent to preclude judicial review of unconstitutional agency decisions to place land into Indian trust status. Under *Webster*, an unconstitutional approval of a Native allotment is subject to judicial review.

VI. The federal government does not have a colorable claim to Indian land title.

The government must demonstrate that it has a "colorable claim" to Indian title before the QTA's Indian land exception acts to deprive the court of jurisdiction. *Albert*,

38 F.3d at 1076. In *Foster*, the Ninth Circuit applied the doctrine of administrative finality to the 1979 BLM decision and ruled that otherwise arbitrary agency action was rendered non-arbitrary because Alaska did not appeal the decision. *Foster*, 75 F.3d at 452.

The Ninth Circuit erred in according administrative finality to the 1979 BLM decision in this case. First, the 1979 BLM decision took no action against Alaska's rights-of-way. Alaska had no legal standing to appeal the decision under the Interior Department's regulations then in effect because Alaska was not "adversely affected" by the 1979 decision. *Star Lake Railroad Co.*, 121 IBLA 197 (1991) (There is no standing to appeal unless a party is "adversely affected" by the BLM decision being appealed as required by 43 C.F.R. § 4.410(a).) Second, the law in effect at the time the 1979 decision was issued preserved the highway grants in Alaska's favor.[8] Highway rights-of-way were given priority over allotments in 1979. The BLM did not change its interpretation of the law on this point until 1987. *State of Alaska (In Re Johnson & Craig)*, 133 IBLA 281, 287 n.8 (1995); *GVEA (On Reconsideration)*, 98 IBLA 203, 207 n.1 (1987).

In *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), the court determined reviewable a

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[8] As stated above, Alaska's highway grants under 23 U.S.C. § 317 must be construed in accordance with the law in effect on the date the grants were made. *Myers*, 378 F.2d at 702. *See also Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 n.12 (1984) (The retroactive application of a changed policy is impermissible where there has been detrimental reliance on the former policy.)

1979 agency decision first applied against a mining company's interest in 1987. The company claimed the 1979 decision was "*ultra vires* and an unconstitutional taking." *Id.* at 711-12. In applying the six-year statute of limitations to the action for judicial review, the court balanced "the government's interest in finality [of the agency decision against] a challenger's interest in contesting an agency's alleged overreaching." *Id.* at 715. The court held that an adversely affected party may raise an *ultra vires* or constitutional challenge to an agency decision by filing an action for judicial review within six years of the first application of that decision to a specific interest. *Id.* at 716.

Under *Wind River*, Alaska had the right to challenge the statutory and constitutional basis for the BLM's 1979 decision within six years of the BLM's March 1989 decision. The March 1989 BLM decision was the first agency action taken to apply the 1979 decision against Alaska's amended highway grant. App. 55a-56a. Alaska filed its complaint for judicial review within six years of the BLM's 1989 decision and approximately six months after the IBLA affirmed that decision in *State of Alaska*, 125 IBLA 291. App. 40a, 49a, 87a. Therefore, administrative finality did not preclude Alaska's argument with regard to the 1961 material site nor its right to contest BLM's cancellation of its 1969 amended highway grant.

Finally, the Ninth Circuit's conclusion that the government's claim to Indian title was neither arbitrary nor frivolous overlooks the fact that Alaska's amended highway right-of-way is located entirely within Alaska's 1961 material site. App. 101a. BLM declared the 1961 material site to be a valid interest in 1989. App. 55a. Foster's

allotment remains subject to the 1961 material site. App. *id.* The material site could not be "appropriated" to Alaska in 1961, remain "unappropriated" and available for allotment to Foster in 1964, and still be valid in 1989. By force of logic, because the 1961 material site remains valid, Foster's claim to that land cannot be valid. The land within Alaska's material site cannot be Indian land. The Ninth Circuit's decision fails to explain how appropriated mineral land, which cannot be Indian land under the Allotment Act, falls within the QTA's Indian land exception and deprives the court of jurisdiction. Since the land cannot be Indian land, the government plainly has no colorable claim to Indian title for the area within Alaska's 1961 material site.

CONCLUSION

The United States does not need an Allotment Act if the Secretary is free to ignore it in allotting public lands to Alaska Natives.

> We ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.

Bowen, 476 U.S. at 681. Here, the Ninth Circuit held that the Secretary has unfettered discretion to ignore both the Allotment Act and the Constitution in approving Native allotment applications. The Ninth Circuit is wrong in interpreting *Block* to preclude judicial review of *ultra vires*

and unconstitutional agency action. Alaska's petition should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA, *Plaintiff-Appellant,* v. BRUCE BABBITT, Secretary of the Interior; UNITED STATES OF AMERICA; EVELYN FOSTER, *Defendants-Appellees.*	No. 94-35677 D.C. No. CV-93-00038-JKS ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
August 11, 1995 – Fairbanks, Alaska

Opinion filed October 5, 1995
Amended Opinion Filed January 11, 1996
Further Amended March 19, 1996

Before: Cynthia Holcomb Hall, Charles Wiggins, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Wiggins

COUNSEL

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Jeffrey P. Kehne, Attorney, U.S. Department of Justice, Washington, D.C. and Marilyn J. Twitchell, Alaska Legal Services Corporation, Anchorage, Alaska, for the appellees.

ORDER

The amended opinion filed on January 11, 1996 is amended as follows:

1. Delete the last two sentences of Section II, paragraph [1] starting on page 230 of the slip opinion and insert the following language:

> Alaska asserted for the first time at oral argument that the United States does not have a "colorable claim" on behalf of Foster in the land over which the 1969 amended right-of-way runs because Alaska had been issued a material site grant that included that land in 1961. Despite the apparent existence of this material site grant prior to Foster's use of the land, Alaska never raised this ground for invalidating Foster's allotment, either when it was first informed of the allotment in 1979, or during the later BLM and IBLA proceedings.
>
> "The QTA's limitations on actions challenging the United States' assertions of title apply without regard to the ultimate validity of those assertions. As this court has previously stated, '[t]he immunity of the government applies whether the government is right or wrong.' " *Id.* (quoting *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987). Here, as in *Albert*, because

the allotment remains unpatented, the government has a trust interest in the disputed property; "the scope of this trust status is the same, whether or not the State controls rights-of-way over the lands." *Id.* Furthermore, having notified Alaska in 1979 about Foster's allotment and having proceeded through the administrative process without Alaska's challenging the allotment because of the 1961 material site grant, the United States' claim that it held the land in trust for Foster is not arbitrary or frivolous. *See id.* Accordingly, the Quiet Title Act does not waive the government's immunity. *United States v. Mottaz*, 476 U.S. 834, 843 (1986); *Albert*, 38 F.3d at 1073.

2. The cite to *Block* on page 232, line 11 of the slip opinion should read "461 U.S. at 281-82".

With these amendments to the opinion, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

WIGGINS, Circuit Judge:

BACKGROUND

In 1962, the Bureau of Land Management ("BLM") granted the State of Alaska ("Alaska") a right-of-way,

pursuant to 23 U.S.C. § 317, for the construction of the George Parks Highway. The right-of-way grant was amended in 1969 to include a slightly different section of land.

In June 1971, Evelyn Foster applied for a Native allotment of land pursuant to the Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed 1971).[1] The Allotment Act allowed Alaska natives to apply for land that they had used for certain specified purposes for at least five years. 43 U.S.C. §§ 270-1, 270-3 (1970). A section of Alaska's 1969 amended right-of-way grant runs through the parcel of land for which Foster applied. Foster's application was granted by the BLM in 1979, based on the finding that she had used the designated parcel for statutorily specified purposes since 1964.

The BLM issued another opinion in 1989 confirming its prior approval of Foster's allotment, but expressly subjecting the allotment to Alaska's original 1962 right-of-way for the George Parks Highway. The BLM reasoned that Foster's preference right to the land, which vested when she filed a valid allotment application, "related back" to 1964, the date on which she began to use and occupy the land. Thus, because Alaska had received its original right-of-way grant before Foster had begun her

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[1] The Allotment Act was repealed by the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1624) ("ANCSA"). ANCSA contained a savings clause for allotment applications filed pursuant to the Allotment Act that were "pending before the Department of Interior on December 18, 1971." 43 U.S.C. § 1617(a).

use of the land in 1964, Alaska's right-of-way took precedence over Foster's claim to the land under the Allotment Act. By the same reasoning, the BLM determined that Foster's preference right to the land took precedence over Alaska's other claims to the land that arose after 1964, including Alaska's 1969 amended right-of-way.

Alaska appealed the BLM's decision regarding the amended right-of-way to the Interior Board of Land Appeals ("IBLA"), which affirmed the BLM. The IBLA decision in effect voided Alaska's 1969 amended right-of-way. Alaska then filed a complaint in federal district court, seeking judicial review of the IBLA's decision. The district court dismissed the complaint, concluding that it lacked subject-matter jurisdiction over the action due to the United States' immunity from suit under the Quiet Title Act, 28 U.S.C. § 2409a ("QTA").

Alaska appeals the district court's dismissal. We have jurisdiction under 28 U.S.C. § 1291. As explained below, and primarily on the authority of *Alaska v. Babbitt (Albert Allotment)*, 38 F.3d 1068, 1072 (9th Cir. 1994) ("*Albert*"), we affirm the district court's dismissal for lack of subject-matter jurisdiction.

DISCUSSION

I. STANDARD OF REVIEW

The district court's determination regarding subject-matter jurisdiction is reviewed *de novo*, but the court's underlying factual findings "must be accepted unless clearly erroneous." *Albert*, 38 F.3d at 1072.

II. SOVEREIGN IMMUNITY UNDER THE QUIET TITLE ACT

Alaska asserts that the United States is not immune from its suit because the United States has waived its sovereign immunity under 5 U.S.C. § 702 (Administrative Procedure Act ("APA")); 28 U.S.C. § 2409a (QTA); and 43 U.S.C. § 1632(a) (Alaska National Interest Lands Conservation Act ("ANILCA")). In this type of case, however, "the waiver of sovereign immunity must be found, if at all, within the QTA." *Albert*, 38 F.3d at 1073.[2]

Albert further compels our conclusion that the QTA's waiver of sovereign immunity does not permit Alaska's suit. The QTA's waiver expressly does not apply to "trust or restricted Indian lands." 28 U.S.C. § 2409a(a). As long as the United States has a "colorable claim" to a property interest based on that property's status as trust or restricted Indian lands, the QTA renders the government immune from suit. *Albert*, 38 F.3d at 1076. Alaska asserted for the first time at oral argument that the United States does not have a "colorable claim" on behalf of Foster in the land over which the 1969 amended right-of-way runs because Alaska had been issued a material site grant that

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[2] This court did not consider in *Albert* whether the United States had waived its immunity in 43 U.S.C. § 1632(a) (ANILCA § 902). We now hold that section 1632(a) is a statute of limitations provision, rather than an " 'unequivocally expressed' " waiver of immunity. *See Albert*, 38 F.3d at 1072 (quoting *United States v. Nordic Village*, 503 U.S. 30, 33-34 (1992)); *cf.* 16 U.S.C. § 3117(a) (ANILCA § 807) (certain persons aggrieved by the federal government's failure to comply with certain sections of the Act "may . . . file a civil action in the United States District Court for the District of Alaska").

included that land in 1961. Despite the apparent existence of this material site grant prior to Foster's use of the land, Alaska never raised this ground for invalidating Foster's allotment, either when it was first informed of the allotment in 1979, or during the later BLM and IBLA proceedings.

"The QTA's limitations on actions challenging the United States' assertions of title apply without regard to the ultimate validity of those assertions. As this court has previously stated, '[t]he immunity of the government applies whether the government is right or wrong.' " *Id.* (quoting *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987)). Here, as in *Albert*, because the allotment remains unpatented, the government has a trust interest in the disputed property; "the scope of this trust status is the same, whether or not the State controls rights-of-way over the lands." *Id.* Furthermore, having notified Alaska in 1979 about Foster's allotment and having proceeded through the administrative process without Alaska's challenging the allotment because of the 1961 material site grant, the United States' claim that it held the land in trust for Foster is not arbitrary or frivolous. *See id.* Accordingly, the Quiet Title Act does not waive the government's immunity. *United States v. Mottaz*, 476 U.S. 834, 843 (1986); *Albert*, 38 F.3d at 1073.

III. *ULTRA VIRES* EXCEPTION TO SOVEREIGN IMMUNITY

Even though the QTA does not waive the government's sovereign immunity in this case, Alaska also argues that if the BLM acted *ultra vires* in approving

Foster's allotment (which resulted in cancellation of Alaska's right-of-way), then sovereign immunity will not bar Alaska's action for judicial review of the agency's decision. According to Alaska, it may properly bring suit under the Administrative Procedure Act (APA), 5 U.S.C. § 702, which provides a general waiver of sovereign immunity for suits against federal officers in which the plaintiff seeks relief other than money damages.

However, the Supreme Court has expressly held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286 (1983) (rejecting a suit by North Dakota against several federal officials alleging that they unlawfully asserted jurisdiction over a riverbed that belonged to the state). The Court noted that if plaintiffs are allowed to avoid the provisions of the QTA by instituting an officer's suit, then

> all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted. . . . If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory.

Id. at 284-85.

Alaska attempts to distinguish its case by claiming that it is not bringing what the Supreme Court calls an "officer's suit," but instead is bringing an "ultra vires" action. This distinction is without merit. The Supreme Court has made it clear that suits alleging "ultra vires" acts, actions that are outside the scope of a government

officer's authority or are unconstitutional, are a subgroup of officer's suits as a whole. *See Block*, 461 U.S. at 281-82; *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 687-90 (1949). Though such "ultra vires" suits regarding federal claims to land may have been permissible prior to the QTA under *Larson* and *Malone v. Bowdoin*, 369 U.S. 643 (1962), the *Block* court "applied the rule that a precisely drawn, detailed statute pre-empts more general remedies," *Block*, 461 U.S. at 285, in finding that the QTA dictated the exclusive means by which a challenge to the United State's [sic] title to land could be brought. Thus, the Court has specifically proscribed officer's suits, including "ultra vires" suits, as a means of divesting the government's sovereign immunity in quiet title actions relating to trust or restricted Indian land.

Furthermore, the Court expressly rejected the claim that Section 702 of the APA authorizes such suits against federal officers:

> [Section 702] waived federal sovereign immunity for suits against federal officers in which the plaintiff seeks relief other than money damages, but it specifically confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The QTA is such an "other statute". . . .

Block, 461 U.S. at 286 n.22 (quoting 5 U.S.C. § 702). In *Block*, the QTA precluded the suit because it was time barred by the QTA's twelve-year statute of limitations. *See also McIntyre v. United States*, 789 F.2d 1408, 1410-11 (9th Cir. 1986) (holding that *Block* precluded a homesteader's APA § 702 quiet title claim and challenge to the

Bureau of Land Management's trespass action against him), *rev'd on other grounds, Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995). In subsequent cases, courts have construed this language to mean that the APA does not waive immunity as to *any claims* that are otherwise precluded by the QTA – for instance, claims precluded by the Indian lands exception. *See Metropolitan Water Dist. of So. Cal. v. United States*, 830 F.2d 139 143-44 (9th Cir. 1987) (rejecting a suit challenging the Secretary of the Interior's authority to resurvey the boundary of an Indian Reservation), *aff'd sub nom California v. United States*, 490 U.S. 920 (1988) (per curiam); *Spaeth v. Secretary of Interior*, 757 F.2d 937, 942-43 (8th Cir. 1985) (holding that the QTA, not APA § 702, governs plaintiff's action, and remanding to determine whether the government can prove a substantial possibility that the lands in question are Indian lands); *Florida v. United States Dept. of the Interior*, 768 F.2d 1248, 1253-55 (11th Cir. 1985) (holding that APA's waiver of sovereign immunity was inapplicable to action challenging Department of Interior acquisition of land to construct museum to display artifacts and inter remains uncovered from Indian burial site). Thus, officer's suits brought under the APA have also failed to surmount the government's claim of sovereign immunity under the Indian lands exception.

In *Albert*, we noted that the State, in a similar challenge, had not presented sufficient evidence to support its claim that the Secretary or the agency acted either ultra vires or unconstitutionally. *Albert*, 38 F.3d at 1076. It is true, in general, that such evidence is necessary before this Court may divest a federal officer of sovereign immunity, and the Court correctly noted that the State

had not made a sufficient showing. This court did not, however, address the issue of whether an officer's suit supported by sufficient evidence would be permissible if the suit were otherwise barred by the QTA's Indian lands exception. Because the Supreme Court in *Block* clearly indicated that plaintiffs may not employ officer's suits to circumvent the QTA's Indian lands exception, we must adhere to this precedent and hold that Alaska's officer's suit is precluded by the United States' sovereign immunity.

Thus, in light of *Block*'s holding that the QTA is the exclusive means to challenge the United States' title to real property, we must reject Alaska's suit against the BLM and its officers. We therefore hold that Alaska may not use the ultra vires exception to sovereign immunity to divest the United States of immunity in this case.

IV. INITIATION OF ADMINISTRATIVE PROCEEDINGS

On the basis of *Albert*, we reject Alaska's argument that the United States waived its immunity from suit by initiating an administrative action against the State. *See* 38 F.3d at 1074-75.

CONCLUSION

Although Alaska urges us to distinguish *Albert*, we cannot find a legally sound basis for doing so. Unless and until an *en banc* panel of the Ninth Circuit revisits *Albert*, we are bound to follow it. That means that we must hold in this case that Alaska's suit is precluded by the United States' sovereign immunity. We accordingly affirm the

district court's dismissal of the case for lack of subject-matter jurisdiction.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA, *Plaintiff-Appellant,* v. BRUCE BABBITT, Secretary of the Interior; UNITED STATES OF AMERICA; EVELYN FOSTER, *Defendants-Appellees.*	No. 94-35677 D.C. No. CV-93-00038-JKS ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
August 11, 1995 – Fairbanks, Alaska

Opinion filed October 5, 1995
Amended Opinion Filed January 11, 1996

Before: Cynthia Holcomb Hall, Charles Wiggins, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Wiggins

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Jeffrey P. Kehne, Attorney, U.S. Department of Justice, Washington, D.C. and Marilyn J. Twitchell, Alaska Legal Services Corporation, Anchorage, Alaska, for the appellees.

ORDER

The panel as constituted in the above case has voted to deny appellant's petition for rehearing and to reject the suggestion for a rehearing en banc filed on November 17, 1995.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The parties are allowed to file a petition for rehearing addressing the modified section III of the amended opinion filed January 11, 1996.

OPINION

WIGGINS, Circuit Judge:

BACKGROUND

In 1962, the Bureau of Land Management ("BLM") granted the State of Alaska ("Alaska") a right-of-way, pursuant to 23 U.S.C. § 317, for the construction of the

George Parks Highway. The right-of-way grant was amended in 1969 to include a slightly different section of land.

In June 1971, Evelyn Foster applied for a Native allotment of land pursuant to the Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed 1971).[1] The Allotment Act allowed Alaska natives to apply for land that they had used for certain specified purposes for at least five years. 43 U.S.C. §§ 270-1, 270-3 (1970). A section of Alaska's 1969 amended right-of-way grant runs through the parcel of land for which Foster applied. Foster's application was granted by the BLM in 1979, based on the finding that she had used the designated parcel for statutorily specified purposes since 1964.

The BLM issued another opinion in 1989 confirming its prior approval of Foster's allotment, but expressly subjecting the allotment to Alaska's original 1962 right-of-way for the George Parks Highway. The BLM reasoned that Foster's preference right to the land, which vested when she filed a valid allotment application, "related back" to 1964, the date on which she began to use and occupy the land. Thus, because Alaska had received its original right-of-way grant before Foster had begun her

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[1] The Allotment Act was repealed by the Alaska Native Claims Settlement Act, Pub.L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1624) ("ANCSA"). ANCSA contained a savings clause for allotment applications filed pursuant to the Allotment Act that were "pending before the Department of Interior on December 18, 1971." 43 U.S.C. § 1617(a).

use of the land in 1964, Alaska's right-of-way took precedence over Foster's claim to the land under the Allotment Act. By the same reasoning, the BLM determined that Foster's preference right to the land took precedence over Alaska's other claims to the land that arose after 1964, including Alaska's 1969 amended right-of-way.

Alaska appealed the BLM's decision regarding the amended right-of-way to the Interior Board of Land Appeals ("IBLA"), which affirmed the BLM. The IBLA decision in effect voided Alaska's 1969 amended right-of-way. Alaska then filed a complaint in federal district court, seeking judicial review of the IBLA's decision. The district court dismissed the complaint, concluding that it lacked subject-matter jurisdiction over the action due to the United States' immunity from suit under the Quiet Title Act, 28 U.S.C. § 2409a ("QTA").

Alaska appeals the district court's dismissal. We have jurisdiction under 28 U.S.C. § 1291. As explained below, and primarily on the authority of *Alaska v. Babbitt (Albert Allotment)*, 38 F.3d 1068, 1072 (9th Cir. 1994) ("*Albert*"), we affirm the district court's dismissal for lack of subject-matter jurisdiction.

DISCUSSION

I. STANDARD OF REVIEW

The district court's determination regarding subject-matter jurisdiction is reviewed *de novo*, but the court's underlying factual findings "must be accepted unless clearly erroneous." *Albert*, 38 F.3d at 1072.

II. SOVEREIGN IMMUNITY UNDER THE QUIET TITLE ACT

Alaska asserts that the United States is not immune from its suit because the United States has waived its sovereign immunity under 5 U.S.C. § 702 (Administrative Procedure Act ("APA")); 28 U.S.C. § 2409a (QTA); and 43 U.S.C. § 1632(a) (Alaska National Interest Lands Conservation Act ("ANILCA")). In this type of case, however, "the waiver of sovereign immunity must be found, if at all, within the QTA." *Albert*, 38 F.3d at 1073.[2]

Albert further compels our conclusion that the QTA's waiver of sovereign immunity does not permit Alaska's suit. The QTA's waiver expressly does not apply to "trust or restricted Indian lands." 28 U.S.C. § 2409a(a). As long as the United States has a "colorable claim" to a property interest based on that property's status as trust or restricted Indian lands, the QTA renders the government immune from suit. *Albert*, 38 F.3d at 1076. The facts in this case are sufficiently similar to those in *Albert* that we feel constrained to hold that the United States has asserted the requisite "colorable claim" to the land in question

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[2] This court did not consider in *Albert* whether the United States had waived its immunity in 43 U.S.C. § 1632(a) (ANILCA § 902). We now hold that section 1632(a) is a statute of limitations provision, rather than an " 'unequivocally expressed' " waiver of immunity. *See, Albert*, 38 F.3d at 1072 (quoting *United States v. Nordic Village*, 503 U.S. 30, 33-34 (1992)); *cf.* 16 U.S.C. § 3117(a) (ANILCA § 807) (certain persons aggrieved by the federal government's failure to comply with certain sections of the Act "may . . . file a civil action in the United States District Court for the District of Alaska").

here. *See id.* Accordingly, the Quiet Title Act does not waive the government's immunity. *United States v. Mottaz*, 476 U.S. 834, 843 (1986); *Albert*, 38 F.3d at 1073.

III. *ULTRA VIRES* EXCEPTION TO SOVEREIGN IMMUNITY

Even though the QTA does not waive the government's sovereign immunity in this case, Alaska also argues that if the BLM acted *ultra vires* in approving Foster's allotment (which resulted in cancellation of Alaska's right-of-way), then sovereign immunity will not bar Alaska's action for judicial review of the agency's decision. According to Alaska, it may properly bring suit under the Administrative Procedure Act (APA), 5 U.S.C. § 702, which provides a general waiver of sovereign immunity for suits against federal officers in which the plaintiff seeks relief other than money damages.

However, the Supreme Court has expressly held that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block v. North Dakota*, 461 U.S. 273, 286 (1983) (rejecting a suit by North Dakota against several federal officials alleging that they unlawfully asserted jurisdiction over a riverbed that belonged to the state). The Court noted that if plaintiffs are allowed to avoid the provisions of the QTA by instituting an officer's suit, then

> all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted. . . . If we were to allow claimants to try the Federal

> Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory.

Id. at 284-85.

Alaska attempts to distinguish its case by claiming that it is not bringing what the Supreme Court calls an "officer's suit," but instead is bringing an "ultra vires" action. This distinction is without merit. The Supreme Court has made it clear that suits alleging "ultra vires" acts, actions that are outside the scope of a government officer's authority or are unconstitutional, are a subgroup of officer's suits as a whole. *See Block*, 461 U.S. at 273-74; *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 687-90 (1949). Though such "ultra vires" suits regarding federal claims to land may have been permissible prior to the QTA under *Larson* and *Malone v. Bowdoin*, 369 U.S. 643 (1962), the *Block* court "applied the rule that a precisely drawn, detailed statute pre-empts more general remedies," *Block*, 461 U.S. at 285, in finding that the QTA dictated the exclusive means by which a challenge to the United State's [sic] title to land could be brought. Thus, the Court has specifically proscribed officer's suits, including "ultra vires" suits, as a means of divesting the government's sovereign immunity in quiet title actions relating to trust or restricted Indian land.

Furthermore, the Court expressly rejected the claim that Section 702 of the APA authorizes such suits against federal officers:

> [Section 702] waived federal sovereign immunity for suits against federal officers in which the plaintiff seeks relief other than money damages, but it specifically confers no "authority to

> grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The QTA is such an "other statute". . . .

Block, 461 U.S. at 286 n.22 (quoting 5 U.S.C. § 702). In *Block*, the QTA precluded the suit because it was time barred by the QTA's twelve-year statute of limitations. *See also McIntyre v. United States*, 789 F.2d 1408, 1410-11 (9th Cir. 1986) (holding that *Block* precluded a homesteader's APA § 702 quiet title claim and challenge to the Bureau of Land Management's trespass action against him), *rev'd on other grounds, Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995). In subsequent cases, courts have construed this language to mean that the APA does not waive immunity as to *any claims* that are otherwise precluded by the QTA – for instance, claims precluded by the Indian lands exception. *See Metropolitan Water Dist. of So. Cal. v. United States*, 830 F.2d 139, 143-44 (9th Cir. 1987) (rejecting a suit challenging the Secretary of the Interior's authority to resurvey the boundary of an Indian Reservation), *aff'd sub nom California v. United States*, 490 U.S. 920 (1988) (per curiam); *Spaeth v. Secretary of Interior*, 757 F.2d 937, 942-43 (8th Cir. 1985) (holding that the QTA, not APA § 702, governs plaintiff's action, and remanding to determine whether the government can prove a substantial possibility that the lands in question are Indian lands); *Florida v. United States Dept. of the Interior*, 768 F.2d 1248, 1253-55 (11th Cir. 1985) (holding that APA's waiver of sovereign immunity was inapplicable to action challenging Department of Interior acquisition of land to construct museum to display artifacts and inter remains uncovered from Indian burial site). Thus, officer's suits

brought under the APA have also failed to surmount the government's claim of sovereign immunity under the Indian lands exception.

In *Albert*, we noted that the State, in a similar challenge, had not presented sufficient evidence to support its claim that the Secretary or the agency acted either ultra vires or unconstitutionally. *Albert*, 38 F.3d at 1076. It is true, in general, that such evidence is necessary before this Court may divest a federal officer of sovereign immunity, and the Court correctly noted that the State had not made a sufficient showing. This court did not, however, address the issue of whether an officer's suit supported by sufficient evidence would be permissible if the suit were otherwise barred by the QTA's Indian lands exception. Because the Supreme Court in *Block* clearly indicated that plaintiffs may not employ officer's suits to circumvent the QTA's Indian lands exception, we must adhere to this precedent and hold that Alaska's officer's suit is precluded by the United States' sovereign immunity.

Thus, in light of *Block*'s holding that the QTA is the exclusive means to challenge the United States' title to real property, we must reject Alaska's suit against the BLM and its officers. We therefore hold that Alaska may not use the ultra vires exception to sovereign immunity to divest the United States of immunity in this case.

IV. INITIATION OF ADMINISTRATIVE PROCEEDINGS

On the basis of *Albert*, we reject Alaska's argument that the United States waived its immunity from suit by

initiating an administrative action against the State. *See* 38 F.3d at 1074-75.

CONCLUSION

Although Alaska urges us to distinguish *Albert*, we cannot find a legally sound basis for doing so. Unless and until an *en banc* panel of the Ninth Circuit revisits *Albert*, we are bound to follow it. That means that we must hold in this case that Alaska's suit is precluded by the United States' sovereign immunity. We accordingly affirm the district court's dismissal of the case for lack of subject-matter jurisdiction.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA, *Plaintiff-Appellant,* v. BRUCE BABBITT, Secretary of the Interior; UNITED STATES OF AMERICA; EVELYN FOSTER, *Defendants-Appellees.*	No. 94-35677 D.C.No. CV-93-00038-JKS OPINION

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
August 11, 1995 – Fairbanks, Alaska

Filed October 5, 1995

Before: Cynthia Holcomb Hall, Charles Wiggins,
and Andrew J. Kleinfeld, Circuit Judges.
Opinion by Judge Wiggins

COUNSEL

E. John Athens, Jr. and Paul R. Lyle, Assistant Attorneys General, Fairbanks, Alaska, for the plaintiff-appellant.

Jeffrey P. Kehne, United States Department of Justice, Washington, D.C., and Marilyn J. Twitchell, Alaska Legal

Services Corporation, Anchorage, Alaska, for the defendants-appellees.

OPINION

WIGGINS, Circuit Judge:

BACKGROUND

In 1962, the Bureau of Land Management ("BLM") granted the State of Alaska ("Alaska") a right-of-way, pursuant to 23 U.S.C. § 317, for the construction of the George Parks Highway. The right-of-way grant was amended in 1969 to include a slightly different section of land.

In June 1971, Evelyn Foster applied for a Native allotment of land pursuant to the Allotment Act, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed 1971).[1] The Allotment Act allowed Alaska natives to apply for land that they had used for certain specified purposes for at least five years. 43 U.S.C. §§ 270-1, 270-3 (1970). A section of Alaska's 1969 amended right-of-way grant runs through the parcel of land for which Foster applied. Foster's application was granted by the BLM in 1979, based on the finding that she had used the designated parcel for statutorily specified purposes since 1964.

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[1] The Allotment Act was repealed by the Alaska Native Claims Settlement Act, Pub.L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1624) ("ANCSA"). ANCSA contained a savings clause for allotment applications filed pursuant to the Allotment Act that were "pending before the Department of Interior on December 18, 1971." 43 U.S.C. § 1617(a).

The BLM issued another opinion in 1989 confirming its prior approval of Foster's allotment, but expressly subjecting the allotment to Alaska's original 1962 right-of-way for the George Parks Highway. The BLM reasoned that Foster's preference right to the land, which vested when she filed a valid allotment application, "related back" to 1964, the date on which she began to use and occupy the land. Thus, because Alaska had received its original right-of-way grant before Foster had begun her use of the land in 1964, Alaska's right-of-way took precedence over Foster's claim to the land under the Allotment Act. By the same reasoning, the BLM determined that Foster's preference right to the land took precedence over Alaska's other claims to the land that arose after 1964, including Alaska's 1969 amended right-of-way.

Alaska appealed the BLM's decision regarding the amended right-of-way to the Interior Board of Land Appeals ("IBLA"), which affirmed the BLM. The IBLA decision in effect voided Alaska's 1969 amended right-of-way. Alaska then filed a complaint in federal district court, seeking judicial review of the IBLA's decision. The district court dismissed the complaint, concluding that it lacked subject-matter jurisdiction over the action due to the United States' immunity from suit under the Quiet Title Act, 28 U.S.C. § 2409a ("QTA").

Alaska appeals the district court's dismissal. We have jurisdiction under 28 U.S.C. § 1291. As explained below, and primarily on the authority of *Alaska v. Babbitt* (*Albert Allotment*), 38 F.3d 1068, 1072 (9th Cir. 1994) (*"Albert"*), we affirm the district court's dismissal for lack of subject-matter jurisdiction.

DISCUSSION

I. STANDARD OF REVIEW

The district court's determination regarding subject-matter jurisdiction is reviewed *de novo*, but the court's underlying factual findings "must be accepted unless clearly erroneous." *Albert*, 38 F.3d at 1072.

II. SOVEREIGN IMMUNITY UNDER THE QUIET TITLE ACT

Alaska asserts that the United States is not immune from its suit because the United States has waived its sovereign immunity under 5 U.S.C. § 702 (Administrative Procedure Act ("APA")); 28 U.S.C. § 2409a (QTA); and 43 U.S.C. § 1632(a) (Alaska National Interest Lands Conservation Act ("ANILCA")). In this type of case, however, "the waiver of sovereign immunity must be found, if at all, within the QTA." *Albert*, 38 F.3d at 1073.[2]

Albert further compels our conclusion that the QTA's waiver of sovereign immunity does not permit Alaska's suit. The QTA's waiver expressly does not apply to "trust or restricted Indian lands." 28 U.S.C. § 2409a(a). As long

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[2] This court did not consider in *Albert* whether the United States had waived its immunity in 43 U.S.C. § 1632(a) (ANILCA § 902). We now hold that section 1632(a) is a statute of limitations provision, rather than an " 'unequivocally expressed' " waiver of immunity. *See Albert*, 38 F.3d at 1072 (quoting *United States v. Nordic Village*, 503 U.S. 30, 33-34 (1992)); *cf.* 16 U.S.C. § 3117(a) (ANILCA § 807) (certain persons aggrieved by the federal government's failure to comply with certain sections of the Act "may . . . file a civil action in the United States District Court for the District of Alaska").

as the United States has a "colorable claim" to a property interest based on that property's status as trust or restricted Indian lands, the QTA renders the government immune from suit. *Albert*, 38 F.3d at 1076. The facts in this case are sufficiently similar to those in *Albert* that we feel constrained to hold that the United States has asserted the requisite "colorable claim" to the land in question here. *See id.* Accordingly, the Quiet Title Act does not waive the government's immunity. *United States v. Mottaz*, 476 U.S. 834, 843, (1986); *Albert*, 38 F.3d at 1073.

III. *ULTRA VIRES* EXCEPTION TO SOVEREIGN IMMUNITY

If the BLM acted *ultra vires* in approving Foster's allotment (which resulted in cancellation of Alaska's 1969 right-of-way), then sovereign immunity will not bar Alaska's action for judicial review of the agency's decision. *Albert*, 38 F.3d at 1076. According to Alaska, the BLM's approval of Foster's allotment application was *ultra vires* because (1) the BLM allocated to Foster land that was not allocable under the Allotment Act, and (2) the BLM lacked the authority to consider Foster's application because the application was not timely filed. Neither argument was expressly raised in *Albert*.

An action is not *ultra vires* simply because it "is arguably a mistake of fact or law." *United States v. Yakima Tribal Court*, 806 F.2d 853, 859-60 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987). An action is *ultra vires*, and results in a divestiture of sovereign immunity, only if "an employee of the United States acts *completely outside his*

governmental authority." Id. (emphasis added).[3] We hold that the *ultra vires* exception does not divest the United States of sovereign immunity in this case.

A. Allocation of Allegedly Unallocable Land

Alaska's 1969 right-of-way was granted pursuant to 23 U.S.C. § 317, which provides, in part, that federal land and materials that are necessary for the construction and maintenance of highways may be "appropriated and transferred to the State highway department." 23 U.S.C. § 317(b). Alaska infers from this language that the land in question was "appropriated" to it in 1969. Alaska therefore reasons that the land was no longer available for allocation to Foster when she filed her application pursuant to 43 U.S.C. § 270-1, because section 270-1 only gives the BLM the authority to issue allotments of "vacant, *unappropriated* and unreserved" public land. (Emphasis added.) According to Alaska, the BLM acted outside its statutory authority by approving for allotment land that had already been "appropriated."

The BLM's reason for according Foster a right to the land, notwithstanding Alaska's 1969 right-of-way, was

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[3] For example, "if a dispute occurs pertaining to the sale of an employee's personal house, his government employment provides him with no shield to liability." 806 F.2d at 859.

An official's actions that allegedly are taken pursuant to an unconstitutional statute, or allegedly unconstitutional actions taken pursuant to a constitutional statute, are subject to a *per se* divestiture of sovereign immunity. *Id.* Alaska does not argue for a divestiture of immunity based on an alleged constitutional violation, however.

the agency's "relation-back doctrine." Under that doctrine, an allotment applicant's preference right to the land is deemed to relate back to the initiation of her use and occupancy. *See Golden Valley Elec. Ass'n*, 98 IBLA 203 (1987). As a result, Foster's preference right was deemed to relate back to 1964. As of that date, the disputed land was, in fact, "unappropriated," and 23 U.S.C. § 317(b) therefore does not preclude a 43 U.S.C. § 270-1 allotment.

Alaska's argument, at bottom, therefore must be a challenge to the relation-back doctrine itself.[4] We sympathize with Alaska's position: It constructed a highway across land granted to it in 1969 – land that, according to Alaska, bore no obvious indicia of use by Foster for three months a year for berry picking – and it is now being required to compensate Foster for its use of the land because the agency has determined, based on Foster's 1971 application, that she has a right to the land that is paramount to Alaska's. Nevertheless, *Albert* compels us to reject such a challenge to the relation-back doctrine. *See* 38 F.3d at 1076 (approving the IBLA's use of the relation-back doctrine as within the agency's statutory authority).[5]

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[4] Alaska's argument in its reply brief, that the agency acted *ultra vires* by "cancelling" Alaska's 1969 right-of-way based on Foster's use and occupancy since 1964, also stands or falls with the validity of the relation-back doctrine. For the same reasons discussed in text, we must reject this argument as well.

[5] Alaska argues that *Albert*'s approval of the relation-back doctrine does not control this case because the IBLA allegedly has repudiated (or at least restricted) the doctrine. Alaska relies on the IBLA's recent decisions in *State of Alaska (Mary Sanford)*, 131 IBLA 121 (1994), *and State of Alaska (Irene Johnson and Jack*

B. Consideration of Foster's Application

Alaska also argues that the agency acted *ultra vires* by approving Foster's allotment application, which Alaska asserts was not timely filed. It is not clear that consideration of an untimely application would constitute *ultra vires* action. *See Yakima Tribal Court*, 806 F.2d at 860 (holding that "[a]lthough [the official] may have violated statutes and regulations regarding owner consent to right-of-

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Craig), 133 IBLA 281 (1995). We cannot agree, however, with Alaska's reading of those cases. In *State of Alaska (Mary Sanford)*, the IBLA expressly declined Alaska's invitation to revisit its prior cases that had approved the "relation-back doctrine." 131 IBLA at 127. The IBLA simply found the doctrine inapplicable on the facts of that case because the applicant had applied for land that was mineral in character and thus statutorily unavailable for allotment *at the time she began her use and occupancy*. *Id.* at 127-28 (only "vacant, unappropriated, and unreserved *non-mineral* land" is subject to allotment under the Allotment Act) (emphasis added). Thus, the applicant had no right to the land, regardless of the applicability of the relation-back doctrine. Similarly, in *State of Alaska (Irene Johnson and Jack Craig)*, the IBLA again reaffirmed the general applicability of the relation-back doctrine, but noted an exception "where the land applied for was mineral-in-character and thus not available for Native allotment during an asserted period of use and occupancy [by the applicant] prior to the time the State was granted its right of way." 133 IBLA at 289-90. Applicability of the relation-back doctrine in this case is not called into question by *State of Alaska (Mary Sanford)* or *State of Alaska (Irene Johnson and Jack Craig)* because the right-of-way at issue in this case is Alaska's 1969 highway right-of-way, and not a material site right-of-way on land that is mineral in character. *See State of Alaska (Mary Sanford)*, 131 IBLA at 127 (noting that mineral material site rights-of-way are treated differently for purposes of relation-back doctrine than other types of rights-of-way).

way changes, those trespasses do not strip him of immunity" because his actions still were not outside his delegated power to enter reservation land and to relocate irrigation canals to serve the tribe better).

Even if we assume that such action would be *ultra vires*, however, we cannot find that the *ultra vires* exception to sovereign immunity applies on the facts of this case. Alaska has offered no substantial evidence to show that an untimely application was in fact considered in this case. *Cf. Albert*, 38 F.3d at 1076 & n. 7 (refusing to consider Alaska's argument that agency acted *ultra vires* by cancelling the State's highway rights-of-way because Alaska "failed to provide any evidence that agency officials exceeded their authority" by doing so). In fact, the evidence in this case is clearly sufficient, under IBLA precedent and agency policies, to demonstrate that Foster's application was timely filed. *See, e.g., State of Alaska (Mary Sanford)*, 131 IBLA at 125; *Ouzinkie Native Corp.*, 83 IBLA at 228; C.R. 31, Ex. 1, at II-3 (excerpt from *BLM Alaska Handbook*).

IV. INITIATION OF ADMINISTRATIVE PROCEEDINGS

On the basis of *Albert*, we reject Alaska's argument that the United States waived its immunity from suit by initiating an administrative action against the State. *See* 38 F.3d at 1074-75.

CONCLUSION

Although Alaska urges us to distinguish *Albert*, we cannot find a legally sound basis for doing so. Unless and

until an *en banc* panel of the Ninth Circuit revisits *Albert*, we are bound to follow it. That means that we must hold in this case that Alaska's suit is precluded by the United States' sovereign immunity. We accordingly affirm the district court's dismissal of the case for lack of subject-matter jurisdiction.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, Plaintiff, v. BRUCE E. BABBITT, Secretary of the Interior; the UNITED STATES of AMERICA; EVELYN FOSTER, Defendants.	Case No. F93-038 CV (JKS) **ORDER** (Filed Jun. 14, 1994)

PROCEDURAL HISTORY

The State of Alaska seeks judicial review of the Interior Board of Land Appeals' ("IBLA") decision in *State of Alaska Department of Transportation and Public Facilities*, 125 IBLA 291 (1993), which affirmed the Bureau of Land Management's ("BLM") approval of Evelyn Foster's application for a Native allotment and essentially voided the state's amended right-of-way to the extent it conflicted with Foster's allotment. The state's Federal-Aid Highway right-of-way grant was amended in 1969, before Foster's application was received by the BLM in 1972. However, Foster was given preference because she initiated her use and occupancy of the land in 1964, before the state filed its application for the amendment. The state claimed that Foster's preference right never properly vested because her allotment application was filed with the BLM after the statutory deadline of December 18, 1971. *See* 43 U.S.C. 1617(a). Invoking the doctrine of

administrative finality, the IBLA refused to consider the state's argument regarding the timeliness of Foster's application because the state failed to appeal earlier BLM decisions approving Foster's application.

The United States contends that the Court lacks subject matter jurisdiction over the state's action for judicial review because sovereign immunity protects the United States from suit and the United States is an indispensable party here. Noting that the Court reached a similar conclusion in *State of Alaska v. Lujan*, No. F90-006 Civil (D. Alaska 1993), the United States has filed a motion to dismiss, arguing that the doctrine of res judicata (more accurately, collateral estoppel or issue preclusion) bars the state from claiming that this Court has jurisdiction in this case. Docket No. 9. In opposing the United States' motion, the state has filed a motion for partial summary judgment, contending that the state is not precluded from seeking an adjudication of the timeliness issue and that the IBLA erred in applying the doctrine of administrative finality. Docket No. 14.

The state has requested oral argument on the pending motions. Docket No. 36. The Court finds that the issues are adequately briefed and that a hearing is unnecessary for the Court to reach a decision on the motions pending in this case. *See* Local General Rule 5(C) and Fed. R. Civ. P. 78.

DISCUSSION

It is well-established under the Eleventh Amendment of the Constitution that the states are barred by federal sovereign immunity from suing the United States unless

Congress expressly waives the immunity. *Block v. North Dakota*, 461 U.S. 273, 280 (1983). Under the Quiet Title Act ("QTA"), Congress waived the United States' immunity with respect to suits involving title to land. 28 U.S.C. § 2409a. However, the Act specifically states that the waiver does not apply to "trust or restricted Indian lands." *Id.* Although the Administrative Procedures Act ("APA") also provides a waiver of sovereign immunity for judicial review of agency actions, the waiver will not apply if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. In *State of Alaska v. Lujan*, F90-0016 [sic] Civil (D. Alaska 1993), this Court held that the express exception for trust or Indian lands under the QTA precludes the state from seeking judicial review under the APA.[1]

Generally, under the doctrine of collateral estoppel, when an issue of fact or law has been determined in a

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[1] In *Lujan*, the state appealed a decision by the IBLA that had voided two of the state's rights-of-way needed for part of the Parks Highway because they conflicted with a Native allotment application. The Native had used and occupied the land since 1938, but did not file the allotment application until February 1968. In the meantime, the BLM had issued the state's rights-of-way grants in December 1965 and November 1966. The IBLA affirmed the BLM's subsequent voiding of the state's grants because the Native's earlier use created an inchoate preference right that vested upon filing the application and related back to the time of the initial use and occupancy. *State of Alaska, Golden Valley Elec. Ass'n*, 110 IBLA 224 (1989). This Court held that it lacked subject matter jurisdiction to consider the state's appeal. The Court explained that the federal government preserved its sovereign immunity regarding trust and Indian lands under the QTA, and therefore sovereign immunity was not waived under the APA.

final judgment, that determination is conclusive in a subsequent action between the parties, whether on the same or different claim. *Restatement (Second) of Judgments* § 27 (1982). Collateral estoppel should not apply, however, when the issue decided is one of law and the two actions involve claims that are substantialiy unrelated. *Id.* § 28. *See* 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4425 (1981). This case and *Lujan* involve different rights-of-way grants, different Native allotments and applicants, and different material issues. For example, the allotment application in *Lujan* clearly was timely, so the Court did not have occasion in that case to consider the argument that if the allotment application was untimely, there would not be a basis for Indian trust title and therefore the QTA exception would not apply. Given the factual differences in this case, the Court finds it inappropriate to dismiss the state's action based upon the doctrine of collateral estoppel.

Nevertheless, applying the more flexible principle of stare decisis, the Court still finds that the state's complaint must be dismissed for lack of subject matter jurisdiction because sovereign immunity protects the United States from suits involving Indian trust lands. The state contends that Foster's application was untimely; therefore, the state argues, her preference right did not vest and the land is not held in trust for a Native under the QTA exception. However, as long as the United States has a "colorable claim" that the land is held in trust for a Native, the QTA exception applies and sovereign immunity will preclude further judicial scrutiny of the state's challenge. The Ninth Circuit has stated as follows:

> Nothing in the statute [QTA] or its history suggests that the United States was to be put to the burden of establishing title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians. . . .
>
> The immunity of the government applies whether the government is right or wrong. The very purpose of the doctrine is to prevent a judicial examination of the merits of the government's position.

Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987). Thus, it appears that if the doctrine of sovereign immunity is to have any meaning, the Court should not inquire into whether or not Foster's application was timely filed, as long as the government has a "colorable claim."

The state distinguishes *Wildman* by contending that the United States' "colorable claim" in *Wildman* did not result from a ruling in the administrative proceeding being reviewed by the court, whereas the United States' claim in Foster's case arises solely from the very decision from which the state appeals. However, this distinction does not vitiate the protective purpose behind the doctrine of sovereign immunity. Indeed, the fact that the IBLA's decision was the result of a process designed to determine the validity of Foster's application, coupled with the fact that the application itself was signed by Foster on June 17, 1971, provides sufficient evidence that the United States has at least a "colorable claim" that it properly holds the land in trust for Foster. Thus, under

Wildman, the QTA exception applies and judicial review is precluded by sovereign immunity.[2]

IT IS THEREFORE ORDERED:

Defendants' motion to enlarge time at **Docket No. 27** in order to respond to Foster's motion to recuse is **DENIED** as moot because Judge Sedwick has recused himself already and has denied a motion for reconsideration. The parties' motions to enlarge time for filing reply briefs at **Docket Nos. 32 and 35 are GRANTED.** Plaintiff's request for oral argument at **Docket No. 36** is **DENIED.** The United States' motion to dismiss and/or motion for summary judgment based on application of collateral estoppel at **Docket No. 9** is **DENIED.** Plaintiff's complaint is **DISMISSED WITH PREJUDICE FOR**

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[2] The state cannot attempt to seek relief under the APA by alleging that the Secretary of the Interior acted wrongfully in voiding the amended right-of-way. The Supreme Court and Ninth Circuit have held that the QTA exception supersedes any waiver of sovereign immunity under the APA. *See Block*, 461 U.S. at 272 n.22; *Metropolitan Water Dist. of Southern California v. United States*, 830 F.2d 139, 143 (9th Cir. 1987), *aff'd sub nom. California v. United States*, 490 U.S. 920 (1989); *Lee v. United States*, 809 F.2d 1406, 1409 (9th Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *McIntyre v. United States*, 789 F.2d 1408, 1410-11 (9th Cir. 1986). Also, the United States has not waived its sovereign immunity by initiating a civil suit to quiet title. *Cf. United States v. Phillips*, 362 F. Supp. 462, 463 (D. Neb. 1973). I am not convinced that the United States even initiated any administrative action; the BLM simply engaged in its routine practice of processing various applications for allotments, land selections, rights-of-way, etc. I do not find that the United States has expressly or impliedly consented to the adjudication of this conflict with the state.

LACK OF SUBJECT MATTER JURISDICTION. Plaintiff's motion for partial summary judgment at **Docket No. 14** is **DENIED** as moot.

6/14/94 /s/ James K. Singleton, Jr.
DATE HONORABLE JAMES K. SINGLETON, JR.
United States District Court Judge
Anchorage, Alaska

UNITED STATES DEPARTMENT OF THE INTERIOR
[SEAL]
IN REPLY REFER TO [LOGO]

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
4015 Wilson Boulevard
Arlington, Virginia 22203

STATE OF ALASKA
DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES

IBLA 89-474 Decided March 9, 1993

Appeal from a decision of the Alaska State Office, Bureau of Land Management, finding that Native Allotment AA-7791 was not subject to amended Federal-Aid Highway right-of-way grant Anchorage 052629.

Affirmed.

1. Alaska: Native Allotments – Rights-of-Way: Federal Highway Act – Rights-of-Way: Nature of Interest Granted

   A Native allotment was not subject to an amended right-of-way grant for a Federal-Aid Highway because the amendment was subject to valid existing rights and was made after initiation of the Native claim.

APPEARANCES: E. John Athens, Jr., Esq., Office of the Attorney General, State of Alaska, Fairbanks, Alaska, for the State of Alaska; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

125 IBLA 291

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska, Department of Transportation and Public Facilities (State), has appealed from an April 24, 1989, decision of the Alaska State Office, Bureau of Land Management (BLM), that denied a State request to subject the Native allotment of Evelynn C. Foster (AA-7791) to amended Federal-Aid Highway right-of-way grant Anchorage 052629.

This case raises the question whether a Native allotment should be made subject to an amended right-of-way grant for a Federal-Aid Highway. It is now well established that a Native allotment will not be made subject to a right-of-way grant where qualifying use and occupancy by the Native applicant was initiated prior to issuance of the right-of-way grant, provided that the allotment applicant has since completed the required 5-year use and occupancy and filed a Native allotment application. *See, e.g., State of Alaska*, 125 IBLA 21, 22 (1992). Conversely, when a right-of-way was established before initiation of use and occupancy by a Native applicant, the Native allotment was made subject to the right-of-way. *Frank Sanford*, 119 IBLA 147, 151 (1991). The only question presented by such cases is whether the right-of-way was granted prior to the initiation of use and occupancy. The instant case gives a twist to the usual situation since it involves not only issuance of a right-of-way grant before, but also an amendment of that grant after initiation of use and occupancy by a Native applicant. The question presented here is whether in such circumstances the Native allotment should be made subject to the *amendment*. We find that it should not.

In the instant case, the United States issued the State a Federal-Aid Highway right-of-way grant, pursuant to the Act of August 27, 1958, 23 U.S.C. § 317 (1988), on November 9, 1962, subject to valid existing rights. It was for the purpose of constructing and maintaining a 102.53-mile long highway (the "George Parks Highway") in the Talkeetna-to-Summit section of a planned highway between Fairbanks and Anchorage, Alaska. The right-of-way encompassed 300 feet on either side of the centerline of the highway or approximately 7,456.69 acres. On November 25, 1968, the State sought to amend the right-of-way grant so as to relocate a portion of the original right-of-way for the purpose of constructing and maintain a new 11.045-mile section of highway known as "Project No. F-035-4(2)." BLM issued the amended right-of-way grant with which we are here concerned on May 13, 1969, subject to valid existing rights. The new part of the highway was constructed at the amended location between 1969 and 1971.

Subsequent to issuance and amendment of the State right-of-way grant, on April 17, 1972, pursuant to the Act of May 17, 1906, *as amended*, 43 U.S.C. §§ 270-1 through 270-3 (1970), Foster filed a Native allotment application. She sought approximately 120 acres of unsurveyed land in protracted sec. 31, T. 21 S., R. 10 W., and protracted sec. 36, T. 21 S., R. 11 W., Fairbanks Meridian, Alaska, claiming seasonal use and occupancy of the land beginning in August 1964, following issuance of the right-of-way grant to the State but prior to issuance of the amended grant. She claimed no improvements on the land, but stated that the corners of her claim were marked. The description of the land sought was amended on August 25, 1972, to

accurately describe the land actually used, occupied, and marked by Foster. The result was a shift to the northwest in the location of the allotment claim, thereby overlapping a portion of the right-of-way for the Federal-Aid Highway, both as it was originally granted in November 1962 and as it was amended in May 1969.

With the exception of an 8-acre parcel then considered mineral in character, BLM held Foster's Native allotment application for approval, following an August 13, 1977, field examination, by decision dated February 26, 1979. BLM held the application for rejection as to the 8-acre parcel, and stated that the entire decision would, in the absence of an appeal, become final 30 days after receipt of the decision. No appeal was filed. Subsequently, by decision dated December 7, 1979, BLM held State selection applications A-063041 and A-063042, filed on August 9, 1965, for rejection to the extent that they conflicted with Foster's approved application. By letter dated December 12, 1979, the State declined an offer to contest the Native allotment application within 60 days. The land encompassed by Foster's entire allotment claim (including the originally-excluded 8-acre parcel) was thereafter surveyed in 1983 and U.S. Survey No. 7492, Alaska, of Lots 1, 2, and 3, was accepted on April 25, 1985, and officially filed on June 7, 1985. The allotment claim was subsequently conformed to the survey. The survey places a section of the State's Federal-Aid Highway right-of-way within the approved allotment claim so that the highway virtually bisects the allotment.

On March 1, 1989, BLM confirmed the December 1979 approval of Foster's allotment application with respect to the approved land and also approved the tentatively

excluded 8-acre parcel, concluding it was not mineral in character. BLM also found that the Native allotment when issued would be subject to the Federal-Aid Highway right-of-way, as originally granted in November 1962. The State objected to this latter determination, requesting BLM to provide that the Native allotment would be subject to the amended right-of-way grant. The April 1989 decision denied this request, concluding that the Native allotment took precedence over the amended right-of-way grant because the application to amend the right-of-way grant was filed in November 1968, after Foster had initiated use and occupancy of the allotment in August 1964. BLM explained that such use and occupancy had given rise to an inchoate preference right that was subsequently perfected by the filing of a Native allotment application in April 1972 (as amended August 1972) that took precedence over the intervening application to amend the right-of-way grant. The State appealed to this Board from the April 1989 BLM decision.

The State now contends that Foster's Native allotment should be made subject to its amended Federal-Aid Highway right-of-way grant since BLM approved the amendment of the original grant before she completed 5 years of use and occupancy, as required by section 3 of the Act of May 17, 1906, *as amended*, 43 U.S.C. § 270-3 (1970), and filed her allotment application. The State argues that when the amended right-of-way was granted Foster had only an inchoate preference right that would not prevent the Native allotment from being made subject to the amended grant.

The State also belatedly challenges the validity of Foster's Native allotment application, contending that

her application was not pending before the Department on or before December 18, 1971, and was not supported by proof of qualifying use and occupancy as to the land covered by the amended right-of-way grant. These matters were previously decided with administrative finality and are not subject to the Board's jurisdiction because there was no timely appeal from the February 1979 and March 1989 BLM decisions approving Foster's application. *See State of Alaska Department of Transportation & Public Facilities*, 124 IBLA 386, 390 (1992). The record establishes that both decisions were received by the State more than 30 days prior to the filing of the State's appeal on May 17, 1989, and therefore the appeal was untimely as to these decisions under 43 CFR 4.411(a) and cannot be here considered.

[1] A Native allotment will not be made subject to a right-of-way grant where qualifying use and occupancy that is open and notorious is initiated by the Native applicant prior to issuance of the right-of-way grant, subject to valid existing rights, thereby giving rise to an inchoate preference right that subsequently vests after completion of 5 years of use and occupancy and the filing of an allotment application. *See State of Alaska Department of Transportation & Public Facilities, supra* at 391; *Golden Valley Electric Association (On Reconsideration)*, 98 IBLA 203, 205 (1987). The reasons for this ruling are that the right-of-way grant is subject, at issuance, to the inchoate preference right of the Native applicant, and that the subsequent vesting of that right relates back to the date of initiation of the use and occupancy and takes precedence over the intervening right-of-way grant.

The State maintains that the situation is different in the case of an amendment of a right-of-way grant where the right-of-way was originally granted prior to the initiation of use and occupancy by the Native applicant and that the Native applicant's vested preference right would in any case be subject to the original right-of-way grant. We disagree with this analysis because we fail to discern any distinction between the original issuance of a right-of-way grant and a subsequent amendment of that grant. In either case, the initiation of qualifying use and occupancy that is open and notorious gives rise to an inchoate preference right that cannot be defeated or burdened by the subsequent issuance of a right-of-way grant whether original or amended. *See Golden Valley Electric Association (On Reconsideration), supra* at 205. Because the original and amended grants were both issued subject to valid existing rights, both were subject to the inchoate preference right. Once vested, that right related back to the date of initiation and took precedence over intervening conflicting rights. *Id.* This rule was designed to afford the Native applicant the full benefits of fee title to the allotted land under the Act of May 17, 1906, unburdened by any conflicting less-than-fee-title rights that did not precede the open and notorious initiation of his or her right thereunder. To hold otherwise would deny the Native the full protection of his or her use and occupancy intended by the Act of May 17, 1906. *See Aguillar v. United States*, 474 F. Supp. 840, 843-45 (D. Alaska 1979). This rule works no hardship on a holder of a right-of-way grant issued subject to valid existing rights.

We also find practical considerations support these conclusions where the effect of the amendment was to

alter the location and dimensions of the right-of-way. In this situation, the effect of the amendment would often be the same as if an entirely new right-of-way had been sought in the amended form. Indeed, we can envision circumstances where the burden on the Native allotment would be considerably greater (perhaps even encompassing the entirety of the allotment lands), so as to deny the applicant the full benefit of lands to which she had a demonstrated statutory preference right. Yet, the State's reasoning would allow the Native allotment to be subject to the "amended" right-of-way in any case. Instead, we believe that a Native allotment should only be burdened to the extent that the Native applicant's lands were covered by a right-of-way grant at the time her use and occupancy began.

In the present case, while the original right-of-way grant was issued in November 1962 (prior to the initiation of Foster's use and occupancy in August 1964), the amendment was granted in May 1969 (following initiation). There is no evidence that such use and occupancy was not open and notorious. The right-of-way amendment came after the creation of Foster's inchoate preference right. Her right subsequently vested when the required 5-year use and occupancy were completed and the allotment application was filed in April 1972 (as amended August 1972). The vested right related back to the date of initiation of use and occupancy in 1964 and the preference right took precedence over the intervening conflicting amended right-of-way grant. *See State of Alaska v. 13.90 Acres of Land*, 625 F. Supp. 1315, 1319 (D. Alaska 1985), *aff'd sub nom. Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987). Therefore, we conclude that

BLM properly declined, in April 1989, to make Foster's Native allotment (AA-7791), when issued, subject to the State's *amended* Federal-Aid Highway right-of-way grant Anchorage 052629.

To the extent that the State has raised other challenges to BLM's refusal to make Foster's Native allotment subject to the State's amended right-of-way grant, they have been considered and rejected. Finally, although the State has requested a hearing, finding no material question of fact, we deny the request. *See Woods Petroleum Co.*, 86 IBLA 46, 55 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary to the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Franklin D. Arness
Franklin D. Arness
Administrative Judge

I concur:

/s/ David L. Hughes
David L. Hughes
Administrative Judge

UNITED STATES DEPARTMENT OF THE INTERIOR
[SEAL] [LOGO]

BUREAU OF LAND MANAGEMENT
ALASKA STATE OFFICE
701 C STREET, BOX 13
ANCHORAGE, ALASKA 99513-0099

AA-7791 (2561)
(964) cmp

APR 24 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Evelyn C. Foster c/o Alaska Legal Services Corporation 1016 West Sixth Avenue, Suite 200 Anchorage, Alaska 99501	:	AA-7791 Native Allotment Application
State of Alaska Department of Transportation and Public Facilities Northern Region, Right-of-Way 600 University, Suite F Fairbanks, Alaska 99509-1096	:	A-052629 Right-of-Way

Reservation Subject to Grant as Amended Denied

On April 7, 1989, the State of Alaska requested that the Native allotment application AA-7791 subject to right-of-way A-052629 granted to the State of Alaska on November 9, 1962, also reflect the May 13, 1969 grant.

By decision dated March 1, 1989, Evelyn C. Foster's Native allotment approval was confirmed and the allotment was made subject to the right-of-way A-052629, for the George Parks Highway "granted to the State of Alaska on November 9, 1962."

On November 9, 1962, the State of Alaska was granted a right-of-way for highway purposes. Although no proof of construction was filed by November 9, 1967, action was not taken to cancel the grant. On November 25, 1968, the State filed an amended right-of-way application which was granted on May 13, 1969. This grant was issued subject to valid rights existing on the date of the grant for a strip of land to construct and maintain the George Parks Highway.

Evelyn C. Foster's use and occupancy commenced in August 1964 for lands described as Lots 1, 2, and 3 of U.S. Survey No. 7492, Alaska, which created a preference right on the land. Although the statutory preference right is inchoate, the timely filing of her Native allotment application and evidence of use and occupancy on April 17, 1972, as amended August 25, 1972, vested the preference right, which then took precedence over intervening applications filed subsequent to the commencement of her use and occupancy. Therefore, the allotment can be only subject to the grant issued on November 9, 1962, and the request filed April 7, 1989, from the State of Alaska to make the allotment subject to the grant "as amended," is denied.

An appeal from this decision may be taken to the Interior Board of Land Appeals, Office of Hearings and Appeals, in accordance with the enclosed regulations in Title 43

Code of Federal Regulations (CFR), Part 4, Subpart E. The appellant has the burden of showing that the decision appealed from is in error.

If an appeal is taken, the notice of appeal must be filed with the Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513-7599 within 30 days of the receipt of this decision. Do not send the appeal directly to the Board. The appeal and case history file will be sent to the Board from this office. The regulations also require the appellant to serve a copy of the notice of appeal, statement of reasons, written arguments or briefs on the Regional Solicitor, Alaska Region, U.S. Department of the Interior, 222 West Eighth Avenue, #34, Anchorage, Alaska 99513-7584. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations. Form 1842-1 is enclosed for additional information.

If an appeal is filed, each party in the heading of this decision must be served. In addition, the following agencies must also be served:

Bureau of Indian Affairs
Realty Office
1675 C Street
Anchorage, Alaska 99501-5198

State of Alaska
Department of Natural Resources
Division of Land and Water Management
State Interest Determinations Unit
P.O. Box 107005
Anchorage, Alaska 99510-7005

/s/ Stanley H. Bronczyk
Stanley H. Bronczyk
Chief, Branch of Doyon
Adjudication

UNITED STATES DEPARTMENT OF THE INTERIOR
[SEAL] [LOGO]

BUREAU OF LAND MANAGEMENT
ALASKA STATE OFFICE
701 C STREET, BOX 13
ANCHORAGE, ALASKA 99513-0099

AA-7791 (2561)
(964)

MAR 1 1989

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

Evelyn C. Foster Alaska Legal Services Corporation 615 H Street, Suite 100 Anchorage, Alaska 99501	:	AA-7791 Native Allotment Application
State of Alaska Department of Natural Resources Division of Land and Water Management Land Title Section 3601 C Street, Suite 960 Anchorage, Alaska 99503	:	A-063041, A-063042 State Selections
State of Alaska Department of Transportation and Public Facilities Northern Region, Right-of-Way 600 University, Suite F Fairbanks, Alaska 99709-1096	:	A-062701 Right-of-Way

Native Allotment Application Approval
Confirmed Native Allotment Subject to
Reservation Right-of-Way A-062701 Null and Void

On December 7, 1979, a notice was issued to the State of Alaska which held Native allotment application AA-7791 for approval and State selection applications A-063041 and A-063042 for rejection in part. The lands at issue were for approximately 130 acres within Sec. 31, T. 21 S., R. 10 W., and Sec. 36, T. 21 S., R. 11 W., Fairbanks Meridian, Alaska.

The notice also pointed out that the lands involved have been determined to be without value for minerals. Although an approximate 8-acre portion of Mrs. Foster's claim was determined to be mineral-in-character (valuable for sand and gravel), Sec. 905(a)(3) of the Alaska National Interest Lands Conservation Act of December 2, 1980, 43 U.S.C. 1634, defined sand and gravel as non-mineral. Therefore, the 8-acre portion remained as a portion of the allotment application and was not surveyed out.

On September 13, 1985, the applicant and the interested parties were notified that the allotment application was surveyed and described as Lots 1, 2 and 3 of U.S. Survey No. 7492, Alaska, and was subsequently conformed to survey. Therefore, the approval given December 7, 1979, is hereby confirmed.

The Certificate of Allotment will reserve the following to the United States:

> A right-of-way for ditches or canals constructed by the authority of the United States pursuant to the Act of August 30, 1890, 43 U.S.C. 945.

This allotment shall be subject to:

1. A material site, A-052629 (MS 354-047-2), granted to the State of Alaska, in conjunction with the George Parks Highway, on October 3, 1961, under the provisions of the Federal Aid Highways Act of November 1, 1921 (42 Stat. 216), as amended, and the Act of August 27, 1958, as amended, 23 U.S.C. 317;

2. As to Lot 3, a right-of-way, A-052629, three hundred (300) feet in width (one hundred fifty (150) feet each side of the centerline) for the George Parks Highway, granted to the State of Alaska on November 9, 1962, for a Federal Aid Highway. Act of August 27, 1958, as amended, 23 U.S.C. 317;

3. As to Lot 2, an exclusive use easement for the Alaska Railroad right-of-way, AA-55132, issued to the Alaska Railroad Corporation pursuant to the provisions of the Alaska Railroad Transfer Act of January 14, 1983, 43 U.S.C. 1201, et. seq. on file in the Talkeetna Recording District in Book 105, pages 122-125.

In August 1964, Evelyn C. Foster commenced her use and occupancy of the lands now described within U.S. Survey No. 7492, Alaska, which created a preference right on the land. Although the statutory preference right is inchoate, the timely filing of her Native allotment application and evidence of use and occupancy on April 17, 1972, vested the preference right, which then took precedence over intervening applications filed subsequent to the commencement of her use and occupancy.

On June 24, 1965, the State of Alaska, Department of Highways (now Department of Transportation and Public Facilities) was granted a right-of-way, A-062701 (MS 35-4-017-2), for a material site to construct/maintain the George Parks Highway, located within T. 21 S., R. 11 W., Fairbanks Meridian, and appears to be within the boundaries of A-052629 (MS 354-047-2), a material site. The right-of-way was granted under the provisions of the Federal Aid to Highways Act of August 27, 1948, as amended, 23 U.S.C. 317. The right-of-way was issued subject to valid rights existing on the date of the grant. These rights included Evelyn C. Foster's inchoate preference rights to a Native allotment established by her use and occupancy at the time of the grant. The preference right relates back to the initiation of use and occupancy and preempts conflicting applications filed after that time. Therefore, the right-of-way grant, A-062701, is declared null and void.

Any questions the applicant may have regarding future use relative to the Native allotment application should be directed to Tanana Chiefs Conference, Inc. at the following address.

Tanana Chiefs Conference, Inc.
Realty Office
201 First Avenue
Fairbanks, Alaska 99701

The addressed parties have 60 days from receipt of this decision in which to initiate a private contest against the Native allotment application pursuant to departmental regulation 43 *Code of Federal Regulations* (CFR) 4.450 (copy enclosed).

Failure of any of the addressed parties to initiate a private contest within the time indicated above will result in the Native allotment application being approved and the other parties being rejected as to the lands in Native allotment application AA-7791. This action will become final without further notice. The addressed parties have a 30 day appeal period which commences upon expiration of the 60 days allowed for initiation of a private contest. (*State of Alaska*, 48 IBLA 229). To avoid summary dismissal of the appeal, there must be strict compliance with the regulations. All parties not having the right to initiate a private contest who wish to appeal this decision must follow the provisions of the appeal procedures.

An appeal from this decision may be taken to the Interior Board of Land Appeals, Office of Hearings and Appeals, in accordance with the enclosed regulations in Title 43 *Code of Federal Regulations* (CFR), Part 4, Subpart E. If an appeal is taken, the notice of appeal must be filed with the Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13. Anchorage, Alaska 99513-7599, within 30 days of the receipt of this decision, except for those parties who have the appeal period set forth above. Do not send the appeal directly to the Board. The appeal and case history file will be sent to the Board from this office. The regulations also require the appellant to serve a copy of the notice of appeal, statement of reasons, written arguments or briefs on the Regional Solicitor, Alaska Region, U.S. Department of the Interior, 222 West Eighth Avenue, #34, Anchorage, Alaska 99513-7584. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations. Form 1842-1 is enclosed for additional information.

If a contest or an appeal is filed, each party named in the heading of this decision must be served. In addition, the following agency must also be served:

Chief Executive Officer
Alaska Railroad Corporation
Pouch 7-2111
Anchorage, Alaska 99510

/s/ Stanley H. Bronczyk
Stanley H. Bronczyk
Chief, Branch of Doyon
Adjudication

ALASKA STATE OFFICE
701 C STREET, BOX 13
ANCHORAGE, AK 99613

2561/2620 (941)
AA-7791
A-063041
A-063042

CERTIFIED MAIL 862800, 862801, 862799, 864418
RETURN RECEIPT REQUESTED

NOTICE DEC 7 1979

State of Alaska Department of Natural Resources Division Research & Development 323 East Fourth Avenue Anchorage, Alaska 99501	:	A-063041 A-063042 State Selections
Evelyn C. Foster c/o James F. Vollintine Attorney at Law 805 West Third Avenue Anchorage, Alaska 99501	:	AA-7791 Native Allotment

Native Allotment Held for Approval
State Selection Held for Rejection in Part

On April 17, 1972, as amended August 25, 1972 to correct the legal description, the Bureau of Indian Affairs filed an application on behalf of Evelyn C. Foster under the provisions of the Native Allotment Act. Mrs. Foster claims use and occupancy of the following described unsurveyed land since August of 1964:

T. 21 S., R. 10 W., Fairbanks Meridian
in Sec. 31.

T. 21 S., R. 11 W., Fairbanks Meridian
in Sec. 36.

Containing approximately 130 acres.

The Native allotment application was filed pursuant to the Act of May 17, 1906 (34 Stat. 197), as amended by the Act of August 2, 1956 (70 Stat. 954), and the provisions of the Act of March 8, 1922 (42 Stat. 415), which requires the reservation to the United States of all the coal, oil or gas in land patented thereunder, if prior to issuance of final certificate it is discovered that the lands are coal, oil or gas in character (see 43 CFR 2561.0-8(d) and 43 CFR 2093.4-1). The U.S. Geological Survey has determined that the lands are without value for coal, oil or gas.

On August 9, 1965, as amended, the State of Alaska filed selection applications A-063041 and A-063042 for all of the vacant, unappropriated and unreserved land in Tps. 21 S., Rs. 10 and 11 W., Fairbanks Meridian, under the provisions of section 6(b) of the Act of July 7, 1958, as amended. All of Sec. 31, T. 21 S., R. 10 W., Fairbanks Meridian, was tentatively approved to the State of Alaska on May 31, 1973 (A-063041), but the tentative approval specifically excluded Native allotment application AA-7791. No tentative approval has been granted as to the State's selection application in T. 21 S., R. 11 W., Fairbanks Meridian (A-063042).

An approximate 8-acre portion of Mrs. Foster's claim has been determined to be mineral-in-character (valuable for sand and gravel), and the applicant has been advised that this portion will be surveyed out of her total acreage. This area is described as follows:

> Beginning on the centerline of the Parks Highway at Point Tangent Station 554+00, proceed North 87° West for a distance of 500 feet; thence South 48° West for 1,220 feet; thence South 44° East to the centerline of the Parks Highway. The

centerline of the highway is the eastern limit of the lands determined to be mineral in character. This area encompasses approximately 8 acres.

Based on the evidence found during the August 13, 1977 field examination and the examiner's conclusions, it has been determined that Evelyn C. Foster has used the land for which she applied in such a manner as to satisfy the substantial use and occupancy requirements of the Native Allotment Act, and is therefore being held for approval.

Subsequently, State selection applications A-063041 and A-063042 are held for rejection as to the approximate 122 acres in Mrs. Foster's Native allotment application AA-7791.

The lands in Mrs. Foster's allotment application are not within any selection made under the provisions of the Alaska Native Claims Settlement Act of December 18, 1971.

The State of Alaska has 60 days from receipt of this decision in which to initiate a private contest against the Native allotment applicant pursuant to Departmental regulations 43 CFR 4.450 (copy enclosed). A copy of the Native allotment field report is also enclosed. If this report is not favorable on its face, then our approval is based on affidavits and other supplemental information in the case file.

Failure of the State to initiate a private contest within the time indicated above will result in the Native allotment being approved and the State selection being rejected as to the lands in Mrs. Foster's application.

If a private contest is initiated, the adverse party to be served is:

Mrs. Evelyn C. Foster
c/o James F. Vollintine
Attorney at Law
805 West Third Avenue
Anchorage, Alaska 99501

/s/ Robert E. Sorenson

Chief, Branch of Lands
and Minerals Operations

2561 (941)
AA-7791

CERTIFIED MAIL NO. 862530
RETURN RECEIPT REQUESTED

DECISION FEB 26 1979

Evelyn C. Foster	:	AA-7791
c/o James F. Vollintine	:	
Attorney at Law	:	
805 West Third Avenue	:	
Anchorage, Alaska 99501	:	Native Allotment

Native Allotment Application Held for Rejection in Part; Approval in Part
Lands Mineral in Character

On April 17, 1972, as amended August 22, 1972, the Bureau of Indian Affairs filed an application on behalf of Mrs. Evelyn C. Foster under the provisions of the Native Allotment Act of May 17, 1906. This amended application was for approximately 130 acres of unsurveyed land located in Sec. 36, of T. 21 S., R. 11 W., and Sec. 31 of T. 21 S., R. 10 W., Fairbanks Meridian. Mrs. Foster claims use since August of 1964.

A favorable field report as to substantial use and occupancy of the claimed area was performed on August 3, 1977, and a copy of this report is enclosed for further information. However, the field examiner did see evidence of mineral activity or "potential" use of sand and gravel in this area by the State Highway Department, and therefore requested a mineral examination be performed.

A mineral-in-character examination was performed on June 20, 1978, and it was determined that a portion of the area claimed by Mrs. Foster does contain sand and gravel of sufficient quantity and quality to be used for the maintenance and possible future construction of the Parks Highway. The geologist suggests that the following described area be deleted from Mrs. Foster's Native allotment application as being mineral in character:

> Beginning on the centerline of the Parks Highway at Point of Tangent Station 554+00, proceed North 87° West for a distance of 500 feet; thence South 43° West for 1,220 feet; thence South 44° East to the centerline of the Parks Highway. The centerline of the highway is the eastern limit of the lands determined to be mineral in character. This area encompasses approximately 8 acres.

A copy of the mineral report is enclosed for further information.

It may be noted here that the area delineated above is embraced by two separate material site (MS) right-of-way grants to the State of Alaska, as follows:

> A-062701 MS 35-4-017-2 granted April 28, 1966.
>
> A-052629 MS 35-4-047-2 granted October 3, 1961.
>
> (Note: Both of these grants were made to the State of Alaska under the provisions of Title 23 of the Federal Aid Highway Act.)

The regulations at 43 CFR 2561.0-3 state that the Secretary of the Interior is authorized to allot to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a Native of Alaska:

> . . . not to exceed 160 acres of vacant, unappropriated, and unreserved *nonmineral* land in Alaska. . . . (Emphasis added.)

Therefore, Native allotment application AA-7791 of Mrs. Evelyn C. Foster is hereby held for rejection as to the approximate 8-acre tract delineated above. This decision will become final in 30 days from receipt, unless an appeal is filed.

The remaining 122 acres, more or less, are held for approval, since it appears Mrs. Foster has met the use and occupancy requirements of the Native Allotment Act. Survey will be requested on this portion of her claim when this decision becomes final, and certificate of allotment will issue when survey has been accomplished.

In accordance with the regulations in 43 CFR 4.400, the applicant has the right of appeal to the Board of Land Appeals, Office of Hearings and Appeals. See enclosed form. If an appeal is to be taken, the notice of appeal must be filed in the Alaska State Office, 701 C Street, Box 13, Anchorage, Alaska 99513 within 30 days of receipt of this decision. To avoid summary dismissal of the appeal, there must be strict compliance with the regulations.

If an appeal is filed, the adverse party to be served with a notice of the appeal is:

State of Alaska
Department of Transportation
and Public Facilities
Central and Southcentral Region
P.O. Box 6750
Anchorage, Alaska 99502

/s/ Robert E. Sorenson

Chief, Branch of Lands
and Minerals Operations

CONSTITUTION OF THE UNITED STATES OF AMERICA

Art. IV, § 3

New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

23 U.S.C. § 317.

(a) If the Secretary determines that any part of the lands or interests in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.

(b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department, or its nominee, for such purposes and subject to the conditions so specified.

(c) If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

(d) The provisions of this section shall apply only to projects constructed on a Federal-aid system or under the provisions of chapter 2 of this title.

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28 U.S.C. § 2409a.

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

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43 U.S.C. §§ 270-1 and 270-3.

Sec. 1. That the Secretary of the Interior is authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of vacant, unappropriated, and unreserved nonmineral land in Alaska, or, subject to the provisions of Sections 270-11 and 270-12 of this title, vacant, unappropriated, and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits, to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a

native of Alaska, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress: *Provided*, That any Indian, Aleut, or Eskimo who receives an allotment under this Section, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted, and such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres.

. . .

Sec. 3. No allotment shall be made to any person under Section 270-1 to 270-3 of this title until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

(Act of May 17, 1906, 34 Stat. 197, as amended August 2, 1956, Ch. 891, 70 Stat. 954: 43 U.S.C. §§ 270-1, 270-3 (1970), repealed with saving clause by P.L. 92-203, Dec. 18, 1971, 85 Stat. 710, 43 U.S.C. § 1617(a)).

[SEAL] IN REPLY REFER TO:

Serial Number Below

UNITED STATES
DEPARTMENT Or THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
Cordova Building
6th and Cordova
Anchorage, Alaska

Date OCT 3 1961
M.S. 35-4-047-2

DECISION

RIGHT-OF-WAY GRANTED

Details of Grant

Serial Number of grant	Anchorage 052629
Parcel Number	13-2
Date Application filed	July 14, 1960
Name of grant	State of Alaska Department of Public Works Division of Highways
General location of grant	Portion of protracted Section 36, T. 21 S., R. 11 W., F.M. Parcel containing approximately 64.39 acres.
Master map for 052629 (highway and 53 material sites with identifying parcel numbers) on file at the Anchorage Land Office showing the exact location and dimensions of right-of-way:	

Date filed	July 14, 1960
Map designations	Tippetts-Abbett-McCarthy-Stratton Mark Hurd Aerial Surveys April 4, 1960 (Plate 2 through Plate 17)
This grant shown on	Plate 13 of the above identified map (copy of applicable portion of Plate 13 attached hereto).
Authority for grant	Act of August 27, 1958 (72 Stat. 885; 23 U.S.C. 317)
Code Reference	43 CFR 244, Subparts A and G
Circular number	1915
Date of grant	OCT 3 1961

Terms and Conditions of Grant

Pursuant to the authority vested in the undersigned by Order Number 541 of the Director, Bureau of Land Management, dated April 21, 1954 (19 F.R. 2473), as amended, a right-of-way, the details of which are shown above and on the map on file at the Anchorage Land Office, is hereby granted for the public lands involved[1], subject to the following terms and conditions:

1. All valid rights existing on the date of the grant.

---

[1] For the purpose of this grant public domain lands include those reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased.

2. All regulations contained in Subparts A and G of 43 CFR 244.

3. Further terms and conditions as follows:

   (a) Bureau of Land Management special conditions attached hereto.

Attachments:
Map
Special Conditions

/s/ Alfred P. Steger
Alfred P. Steger
Chief, Lands Adjudication Unit

cc: Director

Serial number below

Land Office
Cordova Building
555 Cordova Street
Anchorage, Alaska

Date: NOV 9 1962

DECISION

RIGHT-OF-WAY GRANTED

Details of Grant

Serial number of grant	Anchorage 052629
Name of grantee	State of Alaska Department of Highways
Map showing the location and dimensions of grant:	
Map designations	Tippetts-Abbett-McCarthy-Stratton-Mark Hurd Aerial Surveys- April 4, 1960, Plate 2 of 17 through Plate 17 of 17 and State of Alaska R/W Plats dated March 21, 1961, Sheet 1 of 5 through Sheet 5 of 5 and State of Alaska R/W Plats dated March 27, 1961, Sheet 1 of 8 through Sheet 8 of 8 and State of Alaska R/W Plats dated June 6, 1961, Sheet 1 of 16 through 16 of 16.
Date filed	July 14, 1960 as amended. March 31, 1961, June 14, 1961, July 7, 1961
Permitted use by grantee	Highway Purposes

Authority for grant	Act of August 27, 1958 (72 Stat. 885; 23 U.S.C. 317)
Regulations applicable to grant:	
Code reference	43 CFR 244, Subparts A&G
Circular numbers	1915, 2004, 2012, 2059, 2084
Date of Grant	Nov. 9, 1962
Expiration date of grant	None
Rental:	
Amount	None
When payable by grantee	N/A

Terms and Conditions of Grant

Pursuant to the authority vested in the undersigned by Order No. 684 of the Director, Bureau of Land Management, dated August 28, 1961 (26 F.R. 8216) as amended, a right-of-way, the details of which are shown above, is hereby granted for the public lands involved[1], subject to the following terms and conditions:

1. All valid rights existing on the date of the grant.
2. All regulations in the circulars specified herein.
3. Filing of proof of construction within five years from date of the grant.

---

[1] For the purpose of this grant, public domain lands include those reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased.

4. Other:
Bureau of Land Management Special Conditions attached hereto.

APS
/s/ Alfred P. Steger
Chief, Lands Section

Attachments: Maps
Special Conditions

cc: Director
State Highway Dept. Anchorage
Alaska Railroad

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Anchorage Region
Juneau Field Office
P.O. Box 1751
Juneau, Alaska

Memorandum March 22, 1963

To: Area Director, Bureau of Indian Affairs, Juneau

From: Field Solicitor

Subject: Authority of Bureau of Land Management to grant rights-of-way on Native land allotment entries

The Regional Solicitor, Anchorage, has forwarded to me for answer your request of May 28, 1962, regarding the propriety of certain procedures involved in the above described problem.

During August of 1961, the Alaska Department of Highways made application to your office for a right-of-way across two Indian allotment entries. The application was made pursuant to 25 U.S.C. 323, 62 Stat. 17, an act providing for rights-of-way for all purposes across Indian lands. The State required the land for the purposes of a federal aid highway.

Later, while in Anchorage, Charles H. Jones, your Area Realty Officer checked these two cases with the BLM Land Office there. He discovered that BLM had granted these rights-of-way in accordance with 43 CFR, Part 241. The entrymen in this case concurred in the grant by BLM of these rights-of-way.

The two Indian allotment entries were made pursuant to 49 U.S.C. 357, 34 Stat. 197. The appraisals made by the State were recently reviewed by the Real Property Officer in your Anchorage Field Office and in his opinion the values placed on the land are reasonable. Thus the only question submitted for my conclusions is the propriety of the procedure followed. Since the entrymen have not used and occupied the land for five years, no certificate of allotment has yet been issued. BLM retained the funds paid by the State for the rights-of-way.

The questions you ask regarding the above facts are these: (1) who has authority to grant these rights-of-way and (2) who is entitled to receive the funds paid by the State for the rights-of-way?

Sec. 323 of Title 25, U.S.C., provides that the Secretary of the Interior is empowered to grant rights-of-way across Indian lands. Pursuant to this grant of authority the Secretary has promulgated regulations delegating his authority under the statute to the Bureau of Indian Affairs. See 25 CFR, Part 161, Rights of way Over Indian Lands.

Additonal provisions are made for the granting of rights-of-way over non-Indian lands by the Bureau of Land Management. More accurately it should be stated that the Bureau of Land Management is the agency concerned with the usual grant of a right-of-way, Indian lands excepted. See 43 CFR, Part 244, particularly Sec. 244.2.

Thus the question is presented: What is the status of the land entered pursuant to the Indian homestead allotment act?

Your opinion request does not state what character the lands involved had prior to the entry. They are referred to by township and range descriptions; for the purposes of this memorandum I will assume that they were public lands.

Rephrasing the first question slightly, you are in effect asking whether the entry of public lands under the Indian allotment act results in these lands becoming, by that act alone, Indian lands. My opinion is that such an entry does not turn the lands into Indian lands within the meaning of 43 CFR Sec. 244.2

In Federal Indian Law (1958 ed.) at 957 it is stated that:

> Under the act of May 17, 1906, the Secretary of the Interior may allot nonmineral land not exceeding 160 acres to any native who is the head of a family or who is 21 years of age. It also provides that such allotment shall be deemed the homestead of the Allottee and his heirs forever and shall be inalienable and non-taxable until Congress provides otherwise. The allotment right is limited to a single entry and may not include incontiguous tracts of public land. (Memo. Assoc. Sol. H. 36352, June 27, 1956.)

The land may then be treated as public lands – if such was its prior character – until a certificate of allotment is granted.

Since then the lands are public lands it follows that BLM is the agency to approve a right-of-way permit.

Your second question related to the right of the Bureau of Land Management to retain the proceeds paid by the State. My opinion is that the allotment entrymen are

entitled to any monies paid by the State for the right-of-way. The interest of the United States is not compensable under 48 U.S.C. 361d as the State, as builder of the road, succeeds to the interest of the United States. The only interest being compensated for is the entryman's. Compare *Charlie*, 44 L.D. 113, with the act of August 2, 1956 (48 U.S.C. 357, as amended, 70 Stat. 954).

[SEAL]
ASO 2234-1
Dec 66

IN REPLY REFER TO:
2234 (921)
A-052629

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
State Office
555 Cordova Street
Anchorage, Alaska 99501

Date: MAY 13 1969

DECISION

Amended RIGHT-OF-WAY GRANTED

Details of Grant

Serial number of grant A-052629

Name of grantee State of Alaska,
Department of Highways
1306 East 4th Avenue
Anchorage, Alaska 99501

Map showing the location and dimensions of grant:

Anchorage District

Map designations Project F-035-4(2);
Parcel No. 9
Hurricane Gulch to East
Fork Chulitna River

Date filed November 25, 1968

Permitted use by grantee Highway Right-of-Way

Authority for grant Act of August 27, 1958 (72 Stat. 885; 23 U.S.C. 317)

Regulations applicable to grant:

Code reference 43 CFR 2234.1 thru 2234.2-4 and 43 CFR Part 17

Date of grant Original Grant October 3, 1961

Expiration Date of grant None

Rental:

Amount N/A

When payable by grantee

Terms and Conditions of Grant

Pursuant to the authority vested in the undersigned by Order No. 701 of the Director, Bureau of Land Management, dated July 23, 1964 (29 FR 10526), as amended, a right-of-way, the details of which are shown above, is hereby granted for the public lands involved[1], subject to the following terms and conditions:

1. All valid rights existing on the date of the grant.
2. All regulations in 43 CFR 2234 as more specifically set forth in the attached terms and conditions.
3. Filing of proof of construction within 7 years from date of the grant.
4. Others:

   Subject to the attached terms and conditions which are made a part hereof by reference,

---

[1] For the purpose of this grant, public domain lands include those reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased.

except that item No. 7 is modified to read "The right-of-way will be developed and used in accordance with the Highway Beautification Act of 1965."

/s/ Neil R. Bassett
Neil R. Bassett
Chief, Branch of Lands

4 Enclosures
Encl. 1 – Map
Encl. 2 – ASO 2234-2
Encl. 3 – ASO 2234-3
Encl. 4 – ASO 2234-4

cc:
Department of Highways, Douglas, Alaska 99824
Federal Highway Administration, Juneau, Alaska 99801

Form 2212-1
(June 1968)
(formerly 4-021 & 2212-1)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FORM APPROVED
BUDGET BUREAU NO. 42-R1359.2

Land Office & Serial Number
AR 7791

File in proper Land Office

ALASKA NATIVE ALLOTMENT APPLICATION AND EVIDENCE OF OCCUPANCY

Act of May 17, 1906 (34 Stat. 197)

1. Name of Applicant *(first, middle initial, and last)*
Mrs. Evelyn C. Foster

Address *(include zip code)*
436 Potter Road
Anchorage, Alaska 99502

2a. Are you a [ ] full [x] mixed blood? [x] Indian [ ] Aleut [ ] Eskimo

b. Were you born and are you now residing in the State of Alaska? [x] Yes [ ] No

3. Sex of Applicant
[ ] Male [x] Female

4a. Are you head of a family? [ ] Yes [x] No
b. Are you at least 21 years of age? [x] Yes [ ] No

5. Give legal description of the lands applied for *(If lands are unsurveyed, describe them in a manner sufficient to permit their ready identification on the ground)*

Approximate location: SE¼SE¼, Sec. 36, T. 21 S., R. 11 W., FM;
W½SW¼, Sec. 31, T. 21 S., R. 10 W., FM

As shown on the attached portion of a copy of USGS quadrangle map Healy A-6 which becomes a part of this application.

6a. Is the land applied for essentially nonmineral? [x] Yes [ ] No *(if "no," specify mineral)*

b. Is the land claimed for mining purposes by any person including yourself? [ ] Yes [x] No

c. Is the land occupied or improved by any person other than yourself? [ ] Yes [x] No

7. Have you received any other allotment under the Act of May 17, 1906, *supra* [ ] Yes [x] No *(if "yes," explain)*

8a. From what date have you occupied the land applied for? August, 19 64

b. Are the corners marked and posted as required by the regulations? [x] Yes [ ] No

EVIDENCE OF OCCUPANCY

1. PERIODS OF ACTUAL RESIDENCE ON THE LAND

CALENDAR YEAR	BEGAN MONTH	BEGAN DAY	ENDED MONTH	ENDED DAY	IF ABSENT FROM THE LAND, GIVE REASONS
1964	8		11		Seasonal use for subsistence
to					(return to town)
present					

2. CULTIVATION OF THE LAND

CALENDAR YEAR	ACRES CULTIVATED	TYPE OF CROPS PLANTED	QUANTITY OF CROPS HARVESTED
		NONE	

3. DOMESTIC ANIMALS KEPT ON THE LAND

CALENDAR YEAR	KIND OF ANIMALS	NUMBER OF ANIMALS
	NONE	

84a

BEST AVAILABLE COPY

4. IMPROVEMENTS

DESCRIPTION OF IMPROVEMENTS	VALUE OF IMPROVEMENTS	DATE MADE
NONE		
	$	

5. FISHING, TRAPPING, AND OTHER USES OF THE LAND

CALENDAR YEAR	USE BEGAN MONTH	USE BEGAN DAY	USE ENDED MONTH	USE ENDED DAY	TYPE OF USE	REMARKS
1964	8		11		hunting	Seasonal use for subsistence
to					berry picking	
present						

Remarks *(Enter here any other information showing compliance with the requirements of the law for substantially continuous use and occupancy of the land for a period of 5 years)*

This land provides my subsistence and a livelihood from picking berries.

I CERTIFY That the statements made herein are true, complete, and correct to the best of my knowledge and belief and are made in good faith.

6/17/71
(Date)

Ina Evelyn C. Frates
(Signature or mark of Applicant)

(Signature of Witness)

WITNESSES MUST SIGN ONLY IF APPLICANT ENDORSES APPLICATION WITH HIS MARK OR THUMB PRINT RATHER THAN BY SIGNATURE

(Signature of Witness)

FOR USE OF BUREAU OF INDIAN AFFAIRS

Certify Hereby That the above-named applicant is a native entitled to an allotment under the appropriate regulations in 43 CFR 2212. I further certify that the applicant has occupied, marked, and posted the lands as stated in this application and that this claim does not infringe on other Native claims or area of Native Community use.

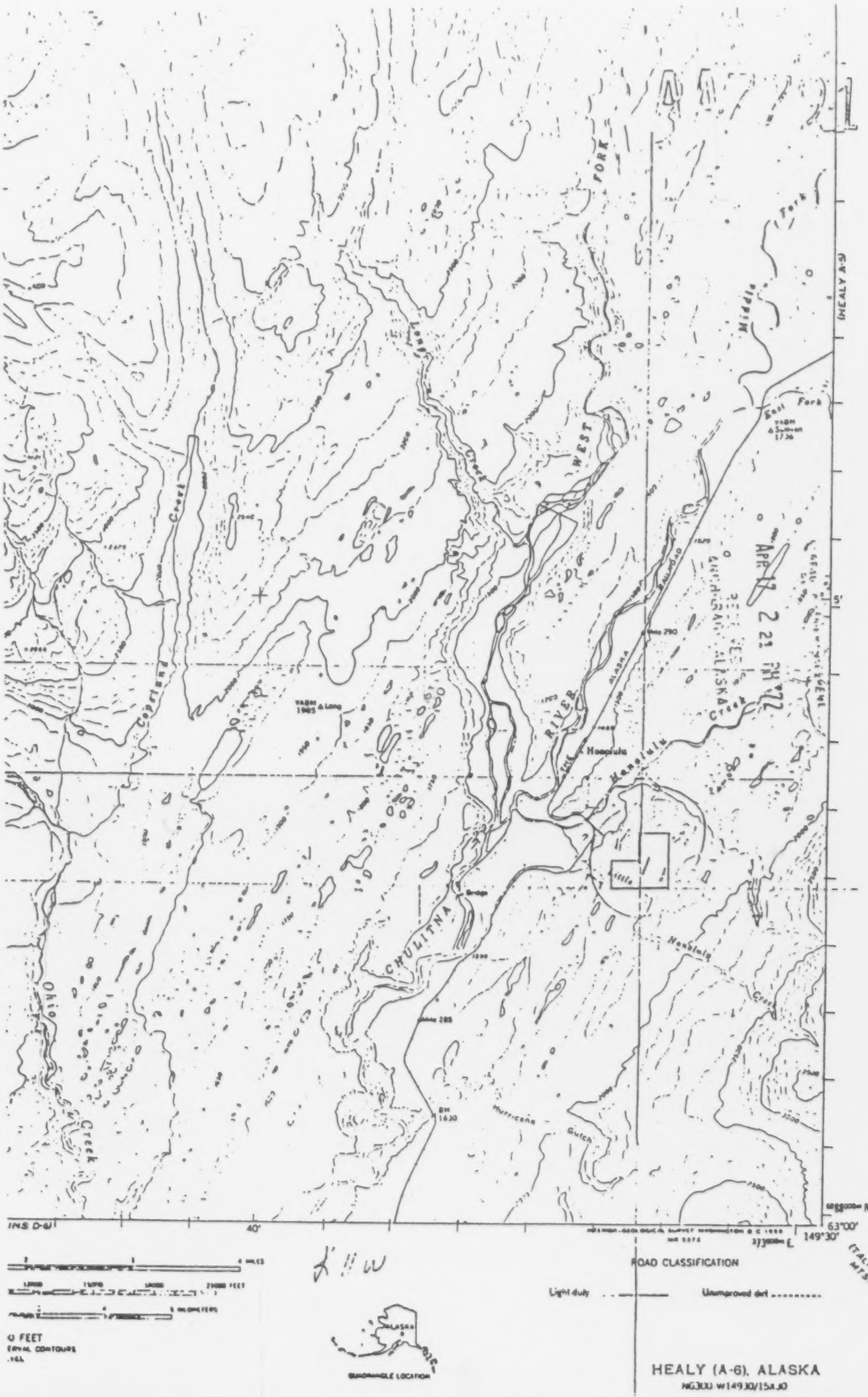
Audrey L Tuck
(Signature)

APR 14 1972
(Date)

REALTY SPECIALIST
(Title)

Title 18 U S C. Section 1001, makes it a crime for any person knowingly and willfully to make to any department or agency of the United States any false, fictitious, or fraudulent statements or representations as to any matter within its jurisdiction.

888-69-56


Copper Creek
Ohio Creek
Lower
West Fork
Middle Fork
Creek
Gulch
Hoodoo
Hanolulu
Creek
Chulitna
Bridge
Hurricane
Gulch
Creek
Alaska
Creek
Bridge
Bridge
Bridge

Office of the Attorney General
State of Alaska
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701
Telephone: (907) 451-2811

Attorneys for the State of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

State of Alaska, Plaintiff, vs. BRUCE E. BABBITT, Secretary of the Interior; the UNITED STATES OF AMERICA; EVELYN C. FOSTER, Defendants.	)	**F93-38 CIV** No. F93 _____ Civil (Filed Sep. 29, 1993)

COMPLAINT

The State of Alaska, through the Office of the Attorney General of the State of Alaska, complains against the defendants as follows:

I. JURISDICTION

1. Subject matter jurisdiction over the State's complaint lies in this court pursuant to 5 U.S.C. § 701 *et seq.* (the Administrative Procedure Act), 28 U.S.C. §§ 1331, 1346(a)(2), 1353, 1361, and 43 U.S.C. §§ 1632(a) and 1634.

2. This action is brought by the State as plaintiff to obtain judicial review of final agency actions by the Secretary of the Interior ("the Secretary") and the U.S. Bureau of Land Management ("BLM"), and a final administrative decision by the Interior Board of Land Appeals ("IBLA"), pursuant to the provisions of the administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and pursuant to the requirements of 43 U.S.C. § 1634. The final administrative decision from which judicial review is sought is *State of Alaska*, No. IBLA 89-474, reported at 125 IBLA 291 (March 9, 1993). A copy of this decision is attached to this complaint as the State's Exhibit A.

II. PARTIES

3. Plaintiff State of Alaska ("the State") is a sovereign state of the United States, and was admitted to the federal union on January 4, 1959, pursuant to the Alaska Statehood Act, 43 U.S.C. note prec. § 21.

4. Defendant Bruce E. Babbitt is Secretary of the United States Department of the Interior. As Secretary, he is named as a defendant by virtue of the several legal capacities in which he, and his predecessors in office, are required to act, and have so acted or have refused to act. Among these are the Secretary's statutory authority to examine, adjudicate and issue certificates for Alaska Native allotments under the Alaska Native Allotment Act of 1906, 43 U.S.C. § 270-1 through 270-3 (repealed December 18, 1971, P.L. 94-203, § 18(a), 85 Stat. 710, with savings clause); and to issue rights of way for public highways pursuant to 23 U.S.C. § 317. The Secretary is also named

as principal for whom his agents IBLA and BLM have acted or have refused to act in this matter.

5. The United States of America is named as a defendant in its capacity as present holder of legal title to the real property at issue in this lawsuit.

6. Individual defendant Evelyn C. Foster, hereinafter "Foster" is named as defendant as a result of her claim to present equitable ownership and legal entitlement to the restricted fee interest of the Native allotment approved by defendant Secretary under U.S. Bureau of Land Management Serial No. AA-7791.

III. FACTS

7. On March 9, 1993, IBLA, on behalf of defendant Secretary, issued its final administrative decision in Case No. IBLA 89-474, upholding earlier decisions of BLM regarding the validity and legal status of the foster allotment claim AA-7791. The net effect of these decisions was to invalidate, and to hold as inferior to the Foster allotment claim, a public highway right-of-way previously granted by the Secretary and his predecessors to the State, and designated as right-of-way A-052629, amended. Implicit in the final approval by BLM of the foster Native allotment application and the final denial by IBLA of the State's appeal of that decision are findings, on legal and factual grounds, that foster's claim to her allotment is chronologically earlier and legally superior to the State's federal public highway right-of-way A-052629, amended, that the allotment application was properly approved by the BLM, and that the allotment claim otherwise complies in all respects with applicable

federal statutes and regulations, all of which are untrue and legally erroneous in several respects.

IV. ALLEGATION OF ERROR OR UNLAWFUL ACTION

FIRST CLAIM FOR RELIEF

8. The State's allegations of fact and assertions of law contained in paragraphs 1 through 7 are incorporated as though fully set forth herein.

9. Defendant Secretary, acting through his Bureau of Land Management and Interior Board of Land Appeals, has taken final actions which are contrary to law in each of the following respects:

(a) The Secretary has approved the Foster claim despite the fact that Foster did not file her allotment application with the Department of the Interior until 1972. Because the allotment application was not pending before the Department on December 18, 1971, as required by 43 U.S.C. § 1617, the Secretary was without subject matter jurisdiction to adjudicate the Foster allotment application. The Foster claim, and the Secretary's decisions with respect to this claim, are therefore void;

(b) The Secretary has approved the Foster claim despite the facts that at the time the Secretary granted the State its federal public highway right-of-way A-052629, amended, the Foster allotment claim was not of record with the BLM. Further, any physical evidence of open, notorious, and exclusive occupancy of the subject tract by Foster was insufficient to put others, including the State,

on notice of the existence of a purported qualifying allotment claim;

(c) The Secretary otherwise lacks lawful authority to revoke unilaterally the federal public highway right-of-way grant A-052629, amended, which he and his predecessors had earlier granted to the State, and in reliance upon which the State has constructed and maintained certain valuable public highway improvement;

(d) The Secretary lacks lawful authority to disregard the public interest, consisting of valid existing statutory, and regulatory requirements and preferences, in deciding that the Foster claim is lawful and superior to the State's right-of-way grant; and the Secretary has abused his discretion in doing so;

(e) The Secretary's actions and refusals to act are arbitrary, capricious, unlawful, and an abuse of discretion.

SECOND CLAIM FOR RELIEF

10. The State's allegations of fact and assertions of law contained in paragraphs 1 through 9 are incorporated as though fully set forth herein.

11. The Secretary has failed or refused to lawfully adjudicate the Foster allotment claim, in each of the following material respects:

(a) The Secretary has failed to correctly determine the lawful effect of the State's federal right-of-way A-052629, amended, as it relates to the State's status as owner of a "valid existing right" to which the allotment claim must be made subject.

(b) The Secretary has failed to provide a lawful forum in which the State may present facts sufficient to establish its status as owner of valid existing rights superior to the Foster Native allotment claim; has failed to make sufficient inquiry into the facts regarding the State's public highway right-of-way grant or the Foster application; and has failed and refused to make adequate findings on the facts before him, and proffered by the State to him, sufficient to determine whether the State does, or does not, own such "valid existing rights" as to which the Foster claim must be made subject.

THIRD CLAIM FOR RELIEF

12. The State's allegations of fact and assertions of law contained in paragraphs 1 through 9 are incorporated as though fully set forth herein.

13. The Secretary incorrectly decided that the pendency before the Department of Foster's application, and whether Foster had qualifying use and occupancy as to the land covered by the amended right-of-way grant, were previously decided with administrative finality and are not subject to the Board's jurisdiction. In fact, the BLM had never decided these issues with knowledge of the State of Alaska with respect to its amended right-of-way grant, and the state never had an opportunity to be heard with respect to its interest. Further, the Secretary always retains discretion to correct a previous decision where there has been no conveyance of the land involved. Further, the Secretary has authority to consider at any time whether an allotment application was pending before the Department on December 18, 1971, since this

issue relates to subject matter jurisdiction of the Department.

FOURTH CLAIM FOR RELIEF

14. The State's allegations of fact and assertions of law contained in paragraphs 1 through 13 are incorporated as though fully set forth herein.

15. The Secretary's actions have without just compensation, deprived the State of valuable property rights of a value presently undetermined, but believed to be $10,000 or less. The property right taken without the payment of just compensation by the Secretary is the state's grant A-052629, amended. The state is entitled to just compensation for the taking of its property, as provided by the Fifth Amendment of the United States Constitution.

16. This is an alternative claim for relief.

FIFTH CLAIM FOR RELIEF

17. The State's allegations of fact and assertions of law contained in paragraphs 1 through 16 are incorporated as though fully set forth herein.

14. Pursuant to 43 U.S.C. § 1166, the Secretary is without authority to now revoke, or to subordinate to the Foster allotment, the State's federal public highway right-of-way grant A-052629, amended. His attempts and those of his agents to do so are therefore unlawful.

SIXTH CLAIM FOR RELIEF

15. The State's allegations of fact and assertions of law contained in paragraphs 1 through 14 are incorporated as though fully set forth herein.

16. The Foster Native allotment claim was not pending before the U.S. Department of the Interior on December 18, 1971, as required by 43 U.S.C. § 1617. Therefore, the Department has no jurisdiction with respect to the Foster allotment claim, and all IBLA and BLM adjudications of the allotment claim are void.

17. The Department of the Interior has failed to conduct a fact finding hearing on the issue of whether the Foster allotment application was timely filed, although evidence before the BLM shows substantial reasons to doubt that the application was timely filed. The decision of the BLM approving the allotment application is arbitrary and capricious because the BLM failed to consider the question of whether the Foster application was timely filed. The IBLA in decision 89-474 ignored its own controlling precedent by refusing to consider the issue of whether the Foster allotment application was timely filed, and in failing to order a government contest on this issue.

SEVENTH CLAIM FOR RELIEF

18. The State's allegations of fact and assertions of law contained in paragraphs 1 through 17 are incorporated as though fully set forth herein.

19. Allotment claimant Foster did not occupy of her allotment claim in an open and notorious manner and to the exclusion of others, so as to sufficiently put the State

on notice of the existence of her claim when the State received federal public highway right-of-way grant A-052629, amended, from the Secretary and his agents and predecessors. As a result, the State's federal highway right-of-way grant is superior in law to the Foster Native allotment claim.

EIGHTH CLAIM FOR RELIEF

20. The State's allegations of fact and assertions of law contained in paragraphs 1 through 19 are incorporated as though fully set forth herein.

21. Allotment claimant Foster failed to file and maintain an allotment application for record at any time before the grant by the Secretary and his agents and predecessors of the federal public highway right-of-way to the State. The State's right-of-way A-052629, amended, was granted by the Secretary to the State before applicant Foster filed her initial allotment application with BLM. The Secretary's right-of-way grant to the State was complete and effective when issued, without qualification or subordination to any valid, pending Foster allotment claim.

NINTH CLAIM FOR RELIEF

22. The State's allegations of fact and assertions of law contained in paragraphs 1 through 21 are incorporated as though fully set forth herein.

23. Each of the governmental and private defendants is barred by the doctrine of equitable estoppel from asserting that the State's public highway right-of-way

grant from the Secretary is inferior to the Foster allotment claim, as a consequence of each of the following acts or omissions by these defendants:

(a) By permitting many years to pass after the grant of the State's amended highway right-of-way before first informing the State that they considered the State's right-of-way invalid and inferior to the Foster claim, thereby prejudicing the ability of the state to obtain factual evidence regarding the events surrounding the Foster allotment occupancy, application and relinquishment, and the State's right-of-way grant and highway construction;

(b) By inducing the State, through their positive acts and by their silence, to believe that its public highway grant A-052629, amended, was a valid existing right or that any such approval of the Foster claim would recognize the State's highway right-of-way as a valid existing right.

(c) By affirmative misconduct of the Secretary and the BLM whereby they made express representations in grant A-052629, amended, that:

1) the grant was subject only to "all valid rights existing on the date of the grant"; and

2) the grant covered public domain land which included those lands "reserved or withdrawn for specific purposes, entered, selected, occupied and/or settled, and leased."

All of the representations were wholly false, and the BLM and Secretary knew that the state would rely on these representations to its detriment.

TENTH CLAIM FOR RELIEF

24. The State's allegations of fact and assertions of law contained in paragraphs 1 through 23 are incorporated as though fully set forth herein.

25. Each of the defendants is barred by the doctrine of equitable estoppel from asserting that the State's amended public highway right-of-way grant is invalid or inferior to the Foster allotment claim, based on the fact that in reliance upon the legal existence of this grant, the state has constructed and maintained a public highway facility, and there is a continuing need for this facility, without notice or protest from the private and federal defendants, although each of the defendants knew at the time the grant was issued and construction had commenced that they believed, and intended to eventually assert, that the State's amended right-of-way grant was inferior or invalid.

ELEVENTH CLAIM FOR RELIEF

26. The State's allegations of fact and assertions of law contained in paragraphs 1 through 25 are incorporated as though fully set forth herein.

27. As to each of the claims for relief in which the State has claimed equitable estoppel against the federal or private defendants based upon the allegations asserted in paragraphs numbered 24 and 26 above, the State in addition asserts its claim of laches against the federal and private defendants. Laches is asserted based upon the defendant's long and unconscionable delay before first raising in a proper forum their claims that the State's

public highway right-of-way grant is invalid or inferior to the Foster allotment claim.

TWELFTH CLAIM FOR RELIEF

28. The State's allegations of fact and assertions of law contained in paragraphs 1 through 27 are incorporated as though fully set forth herein.

29. The federal defendants are barred by the doctrine of legal estoppel or estoppel by deed from asserting that the State's highway right-of-way grant is invalid or inferior to the Foster allotment claim because the terms of the federal grant makes it effective and superior to any other claim to the same federal land arising from settlement, use, or occupancy. In reliance upon the stated and lawful superiority of its public highway right-of-way grant over any conflicting private occupancy claims, the State commenced construction and maintenance of its public highway facility. The federal defendants are estopped by the terms of their amended right-of-way grant from denying that the grant is a "valid existing right."

THIRTEENTH CLAIM FOR RELIEF

30. The state's allegations of fact and assertions of law contained in paragraphs 1 through 29 are incorporated as though fully set forth herein.

31. The doctrine of administrative finality bars an attack on the validity of the state's amended grant A-052629. It was therefore an abuse of discretion for the Secretary, through his subordinates, to consider whether

said grant was defective. By Decision dated June 8, 1970 the BLM determined that this amended grant was accepted and approved. This decision was final and was not appealed.

V. PRAYER FOR RELIEF

WHEREFORE, having appealed the final decisions of the IBLA in Case 89-474, and having appealed other final agency actions and actionable private and governmental acts or failure to act as specified in this Complaint, plaintiff State of Alaska prays for the following relief from this court:

1. That the final decisions of the Interior Board of Land Appeals in Case IBLA 89-474 be reversed;

2. That the Secretary and his agents be ordered to hold a government contest and evidentiary hearing on the issue whether the Foster Native allotment application was pending before the Department of the Interior on December 18, 1971; and if not, to reject the application;

3. That the Secretary and his agents be ordered to make any approval and certificate for the Foster Native allotment claim subject to the prior and superior rights of the State under its federal public highway right-of-way grant A-052629, amended;

4. That the Secretary and his agents be ordered to hold a government contest and evidentiary hearing on the issue of whether Foster had qualifying use and occupancy on the land covered by the grant A-052629, amended, and whether this was sufficiently open and notorious;

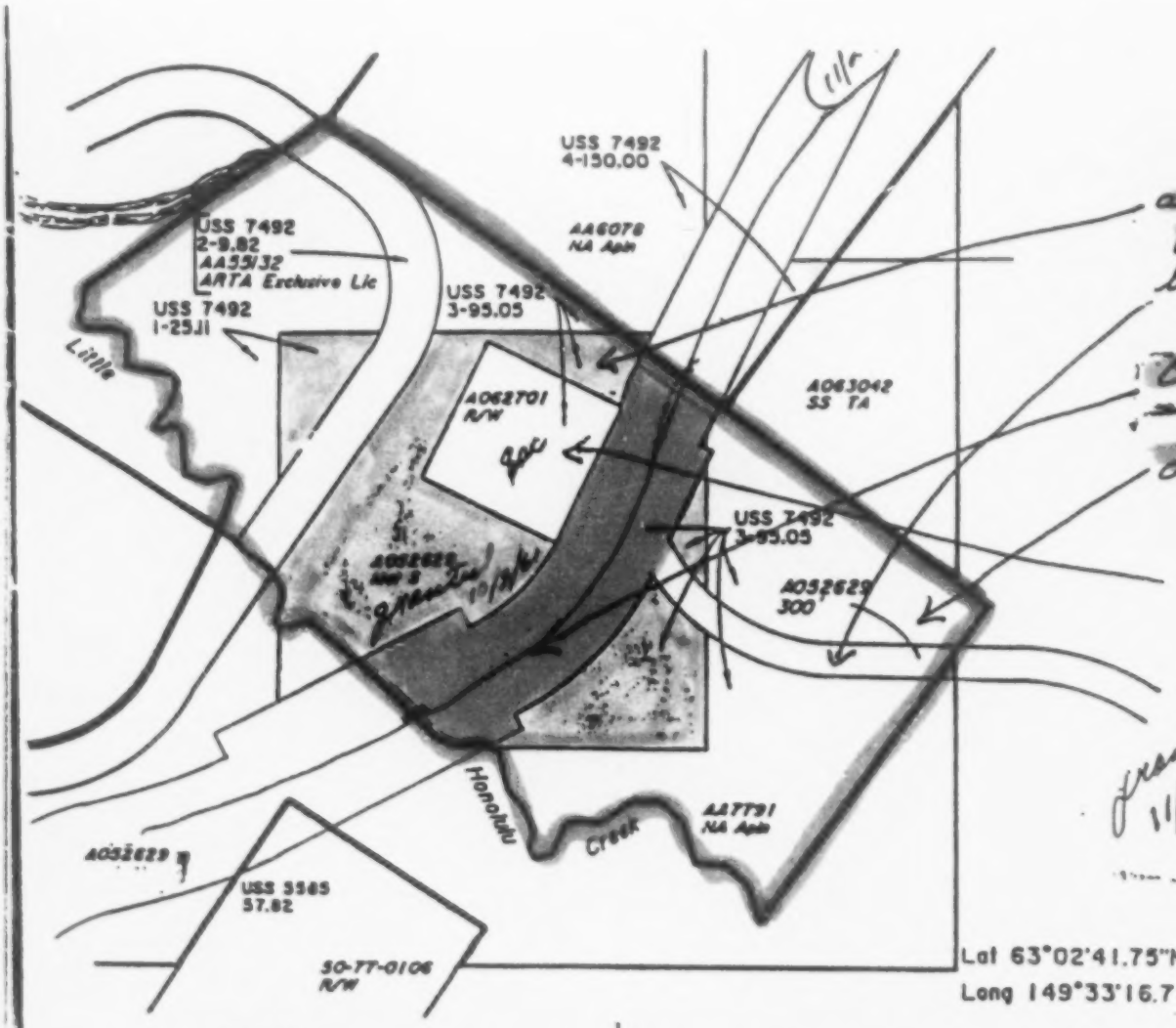
5. Alternatively, that the State be fairly compensated for the value of its federal right-of-way grant which the federal defendants have unlawfully taken;

6. That such other and further relief be granted the State as may be just and equitable in this action.

DATED: Sept. 29, 1993.

CHARLES E. COLE
ATTORNEY GENERAL

By: /s/ E. John Athens, Jr.
E. John Athens, Jr.
Assistant Attorney General



a. Material Site
granted 10/24/61, A-052629

b. R/W A-052629
granted 11/9/62

c. R/W A-052629
filed 11/25/68

d. 122 acres approved
by decision 12/7/

8 acres excluded

granted
11/9/62

101a

WARNING
THIS PLAT IS THE BUREAU'S RECORD OF TITLE AND SHOULD BE USED ONLY AS A GRAPHIC DISPLAY OF TOWNSHIP SURVEY DATA. RECORDS HEREON DO NOT REFLECT TITLE CHANGES WHICH MAY HAVE BEEN EFFECTED BY LATERAL MOVEMENTS OF RIVERS OR OTHER BODIES OF WATER. REFER TO THE CADASTRAL SURVEY FOR OFFICIAL SURVEY INFORMATION.

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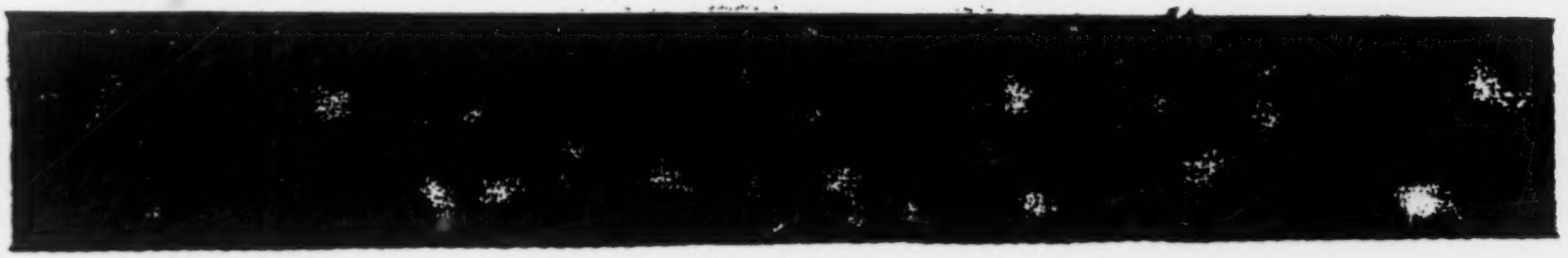

Attachment E

(2)

No. 95-1957

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF ALASKA, PETITIONER

v.

BRUCE E. BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a, authorizes suits against the United States to adjudicate title disputes respecting real property in which the United States claims an interest, but excludes suits pertaining to "trust or restricted Indian lands," 28 U.S.C. 2409a(a). The question presented is whether, as the courts below held, the QTA's exclusion withholds jurisdiction from the federal courts to review a determination by the Department of the Interior that an allotment held in trust by the United States for an Alaska Native takes precedence over the State's right-of-way.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1957

STATE OF ALASKA, PETITIONER

v.

BRUCE E. BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 75 F.3d 449. The order of the district court (Pet. App. 33a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1995. A petition for rehearing was denied on March 19, 1996. Pet. App. 2a-3a. The petition for a writ of certiorari was filed on June 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The State of Alaska challenges a determination by the Department of the Interior that a highway right-of-way that the State has been granted across federal land is partially preempted by an allotment of land to Alaska Native Evelyn Foster. The Bureau of Land Management (BLM) ruled that Foster's claim as allottee to land underlying the right-of-way took precedence over the State's right-of-way. On administrative appeal, the Interior Board of Land Appeals (IBLA) affirmed. Alaska sought judicial review of the IBLA's decision, but the district court held that it lacked subject-matter jurisdiction under the Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a, which excludes from its waiver of sovereign immunity lawsuits against the United States that involve "trust or restricted Indian lands," 28 U.S.C. 2409a(a). Pet. App. 33a-39a. The court of appeals affirmed. *Id.* at 1a-12a.

1. In June 1971, Evelyn Foster submitted an application under the Alaska Native Allotment Act of 1906 (1906 Allotment Act), ch. 2469, 34 Stat. 197, requesting the allotment of an unsurveyed tract of land in south-central Alaska that was later determined to cover roughly 130 acres.[1] The Act authorized the Secretary of the Interior to grant up to 160 acres of "vacant, unappropriated, and unreserved nonmineral

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[1] The 1906 Allotment Act was amended by the Act of August 2, 1956, ch. 891, 70 Stat. 954, and codified, during the period relevant here, at 43 U.S.C. 270-1 to 270-3 (1970). On December 18, 1971, the 1906 Allotment Act was repealed by Section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 710, codified at 43 U.S.C. 1617(a). However, Section 18(a) of ANCSA preserved applications, such as Evelyn Foster's, that were filed before ANCSA's enactment. 85 Stat. 710.

land" to qualified Alaska Natives. 43 U.S.C. 270-1 (1970). Foster claimed a right to the allotment on the ground that she had begun using the land for subsistence purposes in August 1964. Pet. App. 3a-4a, 84a.

2. The tract that Foster requested is crossed by the Talkeetna-to-Summit segment of the George Parks Highway, which was constructed between 1969 and 1971. Pet. App. 3a-4a, 42a. Alaska claims various rights-of-way associated with that highway. The BLM issued four decisions addressing various claims respecting the competing property rights in the land that Foster requested.

a. The BLM's initial decision, issued in February 1979, summarized a field report that verified Foster's claim to subsistence use of the property, beginning in August 1964. See Pet. App. 63a-66a. The BLM accordingly determined that Foster had satisfied the use and occupancy requirements of the 1906 Allotment Act, and it directed that the property requested by Foster (with the exception of eight acres tentatively found to be mineral in character and therefore ineligible for allotment) be "held for approval"—that is, reserved for the issuance of an allotment certificate following completion of an official survey. See *id.* at 65a.

b. The BLM issued a second, related decision concerning the Foster allotment in December 1979. Pet. App. 59a-62a. That decision reiterated the BLM's determination that Foster had used the land requested in her application "in such a manner as to satisfy the substantial use and occupancy requirements of the Native Allotment Act," and it rejected land selections that Alaska had submitted in August 1965 under the Alaska Statehood Act of July 7, 1958, Pub. L. No.

85-508, § 6(b), 72 Stat. 340, codified at 48 U.S.C. Ch. 2 note at 228, insofar as those selections conflicted with Foster's allotment. Pet. App. 61a. The BLM advised Alaska of its right to initiate a "private contest proceeding" challenging Foster's allotment. *Ibid.*, citing 43 C.F.R. 4.450 (1979). The State not only declined to contest the rejection of its Statehood Act selections, but it expressly informed the BLM that it did "*not* intend to initiate contest proceedings" against Foster's application. See Foster's C.A. Supp. Excerpts of Record at CR 32, Exh. 3, Attach. D.

c. In March 1989, the BLM issued a third decision concerning conflicting claims to the Foster allotment. See Pet. App. 53a-58a. By that time, the allotment had been formally delineated in a June 1985 survey. See *id.* at 43a. The BLM's March 1989 decision addressed the status of three state rights-of-way. The BLM ruled that two rights-of-way that had been granted to the State before Foster initiated use and occupancy—an October 1961 material-site right-of-way and a November 1962 roadbed right-of-way—took priority over Foster's claim. Foster's allotment was therefore made "subject to" those rights-of-way. *Id.* at 55a. The third right-of-way, a June 1965 material-site right-of-way, was found to have been preempted by Foster's allotment. *Id.* at 55a-56a. The BLM ruled that Foster held a "preference right" to her allotment relating back to August 1964, when she began using and occupying the land in conformity with the requirements of the 1906 Allotment Act, and that this preference right "preempt[ed] conflicting applications filed after that time." *Id.* at 56a.[2]

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[2] The BLM's February 1979 decision had indicated that the 1965 material site was mineral in character and therefore

d. Upon receiving the March 1989 decision, Alaska asked the BLM to clarify the status of a fourth right-of-way. By letter dated April 5, 1989, the State requested a formal statement from the BLM that Foster's allotment was subject not only to the State's November 1962 roadbed right-of-way, but also to a May 1969 amendment to that right-of-way. The BLM denied that request in April 1989. Pet. App. 49a-52a. Adhering to the logic of its earlier decision nullifying the 1965 material-site right-of-way, the BLM determined that Foster's preference right, dating from August 1964, defeated the State's amended roadbed right-of-way. *Id.* at 50a. The BLM noted that the amended roadbed right-of-way had been expressly made "subject to * * * valid rights existing on the date of the grant." *Id.* at 82a; see 43 C.F.R. 2234.2-4(b)(4) (1969) (authorizing the BLM to impose "any conditions deemed necessary" or "appropriate").

3. Alaska appealed the BLM's April 1989 decision to the IBLA, which affirmed the BLM's ruling. Pet. App. 40a-48a. The IBLA rejected Alaska's assertion that a right-of-way issued under the 1958 Right-of-Way Act necessarily takes precedence over a Native allotment issued in response to an application filed after the grant of the conflicting right-of-way. The IBLA stated:

> A Native allotment will not be made subject to a right-of-way grant where qualifying use and occupancy that is open and notorious is initiated

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ineligible for allotment under the 1906 Allotment Act. See Pet. App. 64a. However, the March 1989 decision concluded that the eight-acre parcel was not, in fact, mineral in character and was therefore eligible for allotment. See *id.* at 54a (discussed by the IBLA at Pet. App. 43a-44a).

> by the Native applicant prior to issuance of the right-of-way grant, subject to valid existing rights, thereby giving rise to an inchoate preference right that subsequently vests after completion of 5 years of use and occupancy and the filing of an allotment application.

Id. at 45a, citing *Golden Valley Elec. Ass'n (On Reconsideration)*, 98 I.B.L.A. 203 (1987).[3] The IBLA also rejected Alaska's attacks on the timeliness of Foster's application and the sufficiency of her evidence concerning use and occupancy. The IBLA ruled that those matters had been resolved by the BLM's February 1979 and March 1989 decisions and that Alaska's failure to bring timely administrative appeals barred those objections. See Pet. App. 44a-45a, citing 43 C.F.R. 4.411(a).

4. Alaska brought suit in federal district court against the United States and the Secretary of the Interior, claiming that the IBLA had erred when it

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[3] *Golden Valley* reversed earlier IBLA precedent on the rights acquired by allottees through the initiation of use and occupancy, see, *e.g.*, *United States* v. *Flynn*, 53 I.B.L.A. 208, 234 (1981), based on the IBLA's review of the federal courts' analyses of allottee interests. See, *e.g.*, *Alaska* v. *13.90 Acres of Land*, 625 F. Supp. 1315, 1319 (D. Alaska 1985) (potential allottee's "inchoate preference right" relates back to initiation of occupancy and thus defeats right-of-way claim), aff'd *sub nom. Etalook* v. *Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987); *Aguilar* v. *United States*, 474 F. Supp. 840, 845 (D. Alaska 1979) (Alaska Natives' preference rights are based on use and occupancy and thus preclude conveyance of potential allotments to the State); cf. *Stockley* v. *United States*, 260 U.S. 532, 544 (1923) (Presidential order withdrawing land from public domain does not apply to unpatented homestead claim since "preliminary homestead entry * * * confer[s] * * * exclusive right of possession").

neither rejected Foster's allotment application outright nor subordinated her allotment to the State's 1969 amended roadbed right-of-way. The district court dismissed for lack of subject-matter jurisdiction. Pet. App. 33a-39a. The court reasoned that the only plausible jurisdictional basis for Alaska's suit against the United States was the QTA, 28 U.S.C. 2409a, which waives federal sovereign immunity to civil actions seeking to adjudicate title disputes involving real property in which the United States claims an interest. See Pet. App. 35a & n.1, 38a & n.2 (APA review unavailable). The court noted, however, that the QTA's waiver of sovereign immunity expressly excludes disputes concerning "trust or restricted Indian lands." *Id.* at 35a, quoting 28 U.S.C. 2409a(a).

Relying on court of appeals precedent applying the Indian lands exception, the district court found that the QTA bars judicial review of title disputes if "the United States has a 'colorable claim' that the land is held in trust for a Native." Pet. App. 36a, quoting *Wildman* v. *United States*, 827 F.2d 1306, 1309 (9th Cir. 1987). The State's challenge to the timeliness of Foster's application, the court found, did not deprive the United States of a colorable basis for identifying the Foster allotment as trust or restricted Indian land. *Id.* at 37a-38a.

5. On appeal, Alaska relied primarily on an argument that an "*ultra vires* exception" to the doctrine of sovereign immunity excused the State from the usual requirement that it identify a clear federal waiver of immunity. Alaska C.A. Br. 1, 8-19. The court of appeals rejected that argument, concluding that *Block* v. *North Dakota*, 461 U.S. 273 (1983), established the QTA's preclusion of ultra vires review.

Pet. App. 7a-11a. The court noted that *Block* had squarely rejected the use of officer suits as a means of avoiding restrictions that the QTA places on the United States' waiver of immunity to suits challenging federal interests in land. *Id.* at 8a. The court found no merit in Alaska's attempt to distinguish its ultra vires theory from the "officer's suit" theory, explaining that ultra vires suits are merely "a subgroup of officer's suits as a whole." *Id.* at 8a-9a.

Alaska also argued, in the alternative, that the QTA's waiver of sovereign immunity applies, notwithstanding the Indian lands exception, because the Secretary lacked colorable grounds for characterizing Foster's allotment as trust or restricted Indian land. The court of appeals rejected Alaska's argument that the State's 1961 material-site right-of-way "appropriated" the land within the boundaries of that right-of-way. The court noted that Alaska had never raised the 1961 material-site right-of-way as a ground for reducing the scope of Foster's allotment, "either when [the State] was first informed of the allotment in 1979, or during the later BLM and IBLA proceedings." Pet. App. 7a. The court ruled that the Secretary's failure to respond to an objection that the State never raised during the administrative process did not deprive the Secretary of a colorable basis for his decision. *Ibid.*

ARGUMENT

Alaska claims that, notwithstanding the QTA's exclusion of suits pertaining to "trust or restricted Indian lands," 28 U.S.C. 2409a(a), the courts have jurisdiction to review this dispute between the State and the Secretary of the Interior over the extent of a Native Alaskan's allotment. The court of appeals'

ruling that the QTA's reservation of sovereign immunity precludes review is correct, and it does not conflict with any decision of this Court or any other court. Further review is therefore unwarranted.[4]

1. The QTA was enacted "to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983); *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). The QTA provides, however, that its waiver of sovereign immunity "does not apply to trust or restricted Indian lands. 28 U.S.C. 2409a(a). That exclusion serves "to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *Mottaz*, 476 U.S. at 842. Congress retained federal immunity against such lawsuits in recognition of the " 'solemn obligations' and 'specific

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[4] This case represents the State's third attempt (on somewhat varied theories) to obtain judicial review of a decision involving the relationship between an Alaska Native allotment and a state right-of-way. See *State of Alaska (Williams Allotment)*, 125 I.B.L.A. 21 (1992), judicial challenge dismissed, *Alaska* v. *Babbitt (Williams Allotment)*, No. F93-016 Civ. (D. Alaska Jan. 21, 1994), aff'd mem., 41 F.3d 1513 (9th Cir. 1994) (Table), cert. denied, 115 S. Ct. 2609 (1995); *State of Alaska (Albert Allotment on Reconsideration)*, 110 I.B.L.A. 224 (1989), judicial challenge dismissed, *Alaska* v. *Babbitt (Albert Allotment)*, No. F90-006 Civ. (D. Alaska Mar. 4, 1993) (tentative opinion, confirmed by May 19, 1993, judgment), aff'd, 38 F.3d 1068 (9th Cir. 1994). A fourth case is currently pending before the Ninth Circuit. See *Alaska* v. *Bryant*, 129 I.B.L.A. 35 (1994), judicial challenge dismissed, *Alaska* v. *Babbitt (Bryant Allotment)*, No. 94-301-CV (D. Alaska Sept. 18, 1995), appeal pending, No. 95-36122 (9th Cir.). Of course, Alaska is collaterally estopped to relitigate claims against the Secretary that were rejected in the prior litigation.

commitments' that the Federal Government had made to the Indians regarding Indian lands," and the consequent inappropriateness of unilaterally "subject[ing] those lands to suit without the Indians' consent." *Id.* at 843 n.6; *Block*, 461 U.S. at 283; *Alaska* v. *Babbitt (Albert Allotment)*, 38 F.3d 1068, 1072-1073 & n.4 (9th Cir. 1994).[5]

Alaska argues (Pet. 6-22) that it is entitled to judicial review without regard to limitations that Congress has placed on the waivers of federal immunity in the QTA because the State has challenged what it claims is ultra vires action by the Secretary of the Interior. The State relies on *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), which indicated that courts could exercise jurisdiction over land title suits against federal officers if those officers acted outside of the scope of their constitutional or statutory authority. However, as this Court indicated in *Block*, Congress enacted the QTA against the backdrop of *Larson* and *Malone*. The QTA displaces all other bases—statutory and nonstatutory—for judicial review of claims challenging federal interests in real property, and hence it precludes claims based

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[5] The QTA's express exclusion of title suits involving trust or restricted land prevents parties from obtaining review of such claims in suits under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because the APA specifically confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," and the QTA is such an "other statute." *Block*, 461 U.S. at 286 n.22; see also *ibid.* ("the QTA expressly 'forbids the relief' which would be sought under [5 U.S.C. 702]"); *Albert Allotment*, 38 F.3d at 1075.

on alleged ultra vires action by federal officials. See *Block*, 461 U.S. at 280-286.

The analysis in *Block* makes clear that judicial review of Alaska's attack on the Foster allotment is unavailable, because that claim is based not on the "careful and thorough remedial scheme" set forth in the QTA, 461 U.S. at 285, but instead on a non-statutory theory of ultra vires conduct by a government officer. Recognition of the theory that Alaska advances here would undercut the carefully considered exceptions to and limitations upon the QTA's waiver of sovereign immunity. As the Court stated in *Block*:

> If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory. The United States could also be dispossessed of the disputed property without being afforded the option of paying damages, thereby thwarting the congressional intent to avoid disruptions of costly federal activities. Finally, and most relevant to the present cases, the QTA's 12-year statute of limitations * * * could be avoided.

Ibid. (emphasis added). *Block* recognizes that the QTA is "the exclusive means by which adverse claimants c[an] challenge the United States' title to real property." *Id.* at 286. The court of appeals accordingly was correct in ruling that *Block* required the dismissal of Alaska's officer's suit.

Alaska's assertion that the federal government is subject to an officer's suit in this case departs from the position that it has simultaneously taken in a case pending before this Court, *State of Idaho* v. *Coeur*

d'Alene Tribe of Idaho, cert. granted, 116 S. Ct. 1415 (1996) (No. 94-1474). Alaska has joined in a brief amicus curiae in that case in which it has argued that a *State* is immune from an officer's suit that "goes to possession and control of a state's navigable waters." See 94-1474 States of California, Alabama, Alaska, *et al.*, Amici Br. at 11 (filed June 3, 1996). That brief specifically relies on *Block*, noting that "an officer's suit may not be used as a substitute for a *federal* quiet title action, since it would constitute a device for circumventing Federal sovereign immunity." *Id.* at 14.

Alaska does not mention the position that it has taken in its *Coeur d'Alene* brief. It does, however, posit a distinction (Pet. 11-12) between "officer's suits," which *Block* unquestionably proscribes, and the State's current challenge to "ultra vires" agency action. That asserted distinction is without merit. As the court of appeals correctly observed, this Court has treated ultra vires suits as simply a "subgroup of officer's suits as a whole." Pet. App. 8a-9a. See *Block*, 461 U.S. at 281-282; *Larson*, 337 U.S. at 689.[6] Moreover, the reasons that *Block* gives for disallowing the

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[6] *Larson*, a leading decision in the development of the "officer's suit" doctrine, repeatedly refers to ultra vires suits as one class of claims that litigants may prosecute against federal officers without identifying a statutory waiver of sovereign immunity. See 337 U.S. at 689 (litigants may challenge conduct that is "*ultra vires* [an official's] authority"); see *id.* at 694 (tortious act is not necessarily "*ultra vires* [an official's] authority"); see also *International Primate Protection League* v. *Administrators of the Tulane Educ. Fund*, 500 U.S. 72, 85-86 (1991) (noting that under *Larson* the question of immunity often "was resolved by examining whether an officer's challenged actions exceeded the powers the sovereign had delegated to him").

officer's suit alternative to QTA jurisdiction apply equally to Alaska's ultra vires claims. Acceptance of Alaska's theory of nonstatutory review, regardless of how it is packaged, would undercut the QTA's carefully crafted exceptions to and limitations upon the QTA's waiver of sovereign immunity (including, most notably, the Indian lands exception).

2. Alaska asserts that the Ninth Circuit's rejection of nonstatutory review under an ultra vires theory in this case conflicts with decisions of two other courts of appeals. See Pet. 16-18, discussing *Florida Dep't of Business Regulation* v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986), and *South Dakota* v. *United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), petition for cert. pending, No. 95-1956 (filed June 3, 1996). Neither decision supports Alaska's request for review by this Court.

Florida did not address *Block*'s unambiguous holding that the QTA's comprehensive remedial scheme displaces nonstatutory review of challenges to federal interests in land. The Eleventh Circuit recited *Block*'s ruling that the QTA displaces APA review, 768 F.2d at 1254 & n.7, but it failed to acknowledge *Block*'s parallel ruling that the QTA displaces review under the officer's suit doctrine, see *id.* at 1251-1252 (discussing limits that *Larson* and *Malone* place on officer's suits). In any event, because the Eleventh Circuit found that the prerequisites for officer's suit jurisdiction had not been satisfied, *id.* at 1252 & 1255 n.9, its suggestion that officer's suits remain viable in the QTA context was mere dictum.

South Dakota also fails to support Alaska's request for review. In that case, South Dakota and the City of Oacoma sought APA review of a decision by the

Interior Department to place 91 acres of land, which had been purchased in fee by the Lower Brule Sioux Tribe, into trust status pursuant to Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 465. The panel majority expressed "doubt whether the [QTA] precludes APA review of agency action by which the United States *acquires* title." 69 F.3d at 881 n.1. But the court concluded that it did not need to resolve that issue because, in its view, the QTA "does not bar claims 'that the Secretary acted unconstitutionally or beyond his statutory authority,'" *ibid.*, quoting *Florida*, 768 F.2d at 1255 n.9, and because, in its view, Section 5 of the IRA represents an unconstitutional delegation of legislative power, see 69 F.3d at 881-885. Although the Eighth Circuit recites the *Florida* dictum concerning nonstatutory review of agency actions in excess of statutory as well as constitutional authority, its decision in *South Dakota* asserts jurisdiction only in the constitutional context.[7]

Alaska attempts to create a conflict between *South Dakota* and the court of appeals' decision in this case by adding a constitutional dimension to its allegation that the Secretary exceeded his authority under the

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[7] The government has petitioned for certiorari in *South Dakota*, requesting that the judgment of the court of appeals be vacated with instructions to remand to the Secretary of the Interior for reconsideration. As our certiorari petition explains, the Interior Department has recently promulgated regulations to ensure that affected parties may seek APA review of decisions by the Interior Department to take land into trust *before* trust status attaches, and judicial review thereafter is barred by the Indian lands exception to the QTA. See Petition for a Writ of Certiorari at 23-27, *United States Dep't of the Interior* v. *South Dakota* (No. 95-1956).

1906 Allotment Act. According to the State (Pet. 20-21), the Secretary's allotment of land that was closed to entry under the 1906 Allotment Act infringes upon Congress's exclusive authority under the Property Clause to control the conveyance of interests in federal lands. Alaska did not raise that constitutional claim before the Interior Department or the courts below and cannot properly introduce it now. In any event, the Property Clause does not make a constitutional case of every claim that a federal land management agency has violated a statutory restriction pertaining to transfers of interests in federal land.[8] As we explain below, Alaska's objections that the Secretary improperly allotted appropriated, mineral land present nothing more than routine (and, in this case, unfounded) disagreements with the Secretary's interpretation of statutes that he is charged with administering.[9]

3. Even if review of title claims against the United States were available outside the QTA under an ultra vires theory, Alaska fails to demonstrate ultra vires conduct in this case. Alaska alleges that the Secre-

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[8] Cf. *Dalton* v. *Specter*, 114 S. Ct. 1719, 1726 (1994) ("If all executive actions in excess of statutory authority were *ipso facto* unconstitutional, * * * there would have been little need in *Larson* for our specifying unconstitutional and ultra vires conduct as separate categories.").

[9] Alaska also complains that the Ninth Circuit's rejection of review under an ultra vires theory in this case contradicted two of that court's earlier decisions. See Pet. 13-16, discussing *Donnelly* v. *United States*, 850 F.2d 1313 (9th Cir. 1988), cert. denied, 488 U.S. 1046 (1989), and *Albert Allotment*, *supra*. We disagree with Alaska's characterization of those cases. See Pet. App. 11a. But in any event, this Court does not ordinarily review intra-circuit conflicts.

tary exceeded his authority under the 1906 Allotment Act to allot "vacant, unappropriated, and unreserved nonmineral land," 43 U.S.C. 270-1 (1970), because the land allotted to Foster had earlier been appropriated and transferred to the State and was mineral in character. Alaska is wrong. The Secretary's decision that Foster qualified for an allotment was plainly within the Secretary's authority.

Alaska first argues (Pet. 18-20, 24-25) that the Secretary exceeded his authority in approving the portion of Foster's allotment that she holds subject to the State's 1961 material-site right-of-way. See Pet. App. 55a. Foster's allotment, according to the State, should not merely have been subordinated to the 1961 material-site right-of-way, it should have been drawn to exclude that area on grounds that the land covered by the 1961 right-of-way had already been "appropriated" to the State. According to the State, because Foster's entry onto this area was invalid, her use and occupancy should not have taken precedence over the State's 1969 roadbed right-of-way across the same area.

Alaska waived that claim at the administrative level. As the court of appeals observed, Alaska did not ask the Interior Department to exclude the 1961 material-site right-of-way from Foster's allotment. See Pet. App. 6a-7a (noting that Alaska first raised this claim during appellate argument). Alaska attacked the BLM's April 1989 decision on a number of grounds, but never mentioned the supposed closure of the land to entry by allottees in 1961. In fulfilling its responsibility to determine conflicting claims to public lands, the Interior Department cannot be said to exceed its statutory authority by failing to respond to objections that claimants did not raise.

In any event, Alaska's contention that right-of-way grants under the 1958 Right-of-Way Act "appropriate" land and close it to entry by native allottees is incorrect. The interest that Alaska acquired in 1961 was not a fee estate, but rather was a right-of-way, subject to immediate reversion upon cessation of the intended use. 23 U.S.C. 317(a) and (c).[10] The IBLA and the courts have not treated such rights-of-way as an "appropriation" of the fee that closes land to entry by allottees.[11] Foster's entry onto this land in August 1964 was fully consistent with Interior Department regulations and with long-standing judicial and administrative precedent. Alaska has identified, at most, a dispute over the Interior Department's interpretation of federal property principles that are within the scope of the agency's responsibility. That dispute cannot give rise to a cause of action for nonstatutory review of allegedly ultra vires executive conduct.[12]

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[10] See 43 C.F.R. 244.7(a) (1954) (right-of-way grants do not confer "any estate of any kind in fee in the lands"); see 43 C.F.R. 244.54(a) n.28 (1954) (interest transferred "is merely a right-of-way"); see also 43 C.F.R. 244.7(a), 244.54(b) n.26 (1964) (corresponding provisions in revised codification).

[11] See, *e.g.*, *Southern Idaho Conference Ass'n of Seventh Day Adventists* v. *United States*, 418 F.2d 411, 415 (9th Cir. 1969) (discussing relationship between material-site right-of-way and underlying fee that had been patented to a later entrant); *State of Alaska (John Billum, Jr.)*, 127 I.B.L.A. 137, 143 (1993), citing *Frank Sanford*, 119 I.B.L.A. 147, 151 (1991); see also *State of Alaska*, 62 I.B.L.A. 187, 194-195 (1982) (homesteaders acquired land subject to right-of-way that had previously been granted to the State).

[12] See *Malone*, 369 U.S. at 644 n.2, 647-648 (allegation that federal officials occupy land under defective title does not make out claim of ultra vires conduct); compare *Payne* v.

Alaska also contends (Pet. 18-19 & n.7) that the Secretary's allotment to Foster was ultra vires because the entire area that is burdened with the 1961 right-of-way is not "nonmineral land," as required by the 1906 Allotment Act. That claim, like the State's prior appropriation claim, was not raised in the Interior Department's proceedings. The BLM specifically addressed the mineral value of the land requested by Foster, and it tentatively excluded eight acres from the area that Foster had requested. See Pet. App. 64a-65a. But the BLM ultimately determined that the parcel was not, in fact, mineral land. *Id.* at 54a; see *id.* at 43a-44a. The State did not contest that determination before the IBLA, much less argue for the broader exclusion that it seeks here. As noted above, the Interior Department cannot reasonably be accused of exceeding its statutory mandate on the ground that it did not address an issue that was not raised.

Moreover, Alaska's claim that Foster's allotment includes mineral lands is not supported by the record below. The Interior Department determines whether lands are mineral in character under the 1906 Allotment Act by ascertaining whether they contain mineral deposits that could be expected to support a profitable, commercial mining operation. See *Heirs of Simon Paneak*, 55 I.B.L.A. 305, 310-311 (1981); see also, *e.g.*, *McCall* v. *Andrus*, 628 F.2d 1185, 1188 (9th Cir. 1980) (describing analogous test of anticipated profitability that determines whether miners have discovered patentable deposits), cert. denied, 450 U.S.

Central Pacific Ry., 255 U.S. 228, 234-235, 238 (1921) (finding of ultra vires executive action based on "depart[ure] from a plain official duty").

996 (1981). The State can point to no proof that the parcel requested by Foster could have supported commercial gravel mining operations in 1971.

4. Finally, Alaska argues (Pet. 22-24), in the alternative, that the QTA waives federal sovereign immunity to its suit, notwithstanding the Indian lands exception, because the United States lacks "a colorable claim to Indian land title." The court of appeals in this case followed its past decisions and reiterated that the United States must have a colorable basis for its assertions that the property qualifies as trust or restricted Indian land. *Albert Allotment*, 38 F.3d at 1076; *Wildman*, 827 F.2d at 1309. Alaska's argument that the Secretary lacks colorable grounds for treating part of Foster's allotment as trust or restricted Indian land rests on its view that the 1961 material-site right-of-way "appropriated" land and closed it to entry by allottees. As we have explained, that claim was not presented to the Interior Department and is meritless in any event. The court of appeals properly found that the United States had a colorable basis for characterizing Foster's entire allotment as Indian trust land. Pet. App. 7a.[13]

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[13] We note that the QTA's comprehensive scheme blocks Alaska's suit not only under the Indian lands exception, but also under 28 U.S.C. 2409a(m), which requires States to provide 180 days' prior notice of their intention to file quiet title actions against the United States. Similar pre-suit notice requirements in other statutes have been strictly enforced even when they operate as limitations on suits against private parties as well as the federal government. *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 29-30 (1989) (notice requirement for citizen suits under the Resource Conservation and Recovery Act of 1976); compare *Block*, 461 U.S. at 286 n.23 (strictly enforcing QTA's 12-year limitations period).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

Petitioner,

vs.

BRUCE E. BABBITT, Secretary of the Interior; the UNITED STATES OF AMERICA; EVELYN C. FOSTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

I. The Ninth Circuit misinterpreted *Block*.

The issue in this case is whether the Ninth Circuit misinterpreted *Block v. North Dakota*, 461 U.S. 273 (1983). The Ninth Circuit ruled that this Court's decision in *Block* precludes judicial review of unconstitutional and statutorily prohibited agency action leading to the creation of Indian land. *State of Alaska v. Babbitt [Foster]*, 75 F.3d 449, 452 (9th Cir. 1996).

In defense of the Ninth Circuit's holding in *Foster*, respondents argue (Opp. at 13-16) that review of the Secretary's decision in this case would undercut the carefully crafted limitations on the waiver of immunity found in the Quiet Title Act[1] (QTA) and that, in any event, the Secretary plainly acted within his statutory authority to issue Native allotments.

The respondents carefully avoid casting their arguments in terms of the question presented by Alaska, to

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[1] The purpose of the QTA, 28 U.S.C. § 2409a, is to protect Indian trust land. *State of Alaska v. Babbitt [Albert]*, 38 F.3d 1068, 1072 n. 4 (9th Cir. 1994). The respondents fail to explain how this purpose is consistent with the case at bar where a holding of immunity has the effect of preserving Alaska's possession and control of the public highway right-of-way. Neither do the respondents attempt to explain how the **creation** of Indian trust land is consistent with the implication of the QTA that this statute concerns land that already exists as Indian trust land. See, *South Dakota v. United States Dep't of Interior*, 69 F.3d 878, 881 n.1 (8th Cir. 1995) ("We doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title.") (emphasis in original).

wit: whether there is jurisdiction to review unconstitutional and statutorily prohibited Secretarial decisions which create Indian trust land. The Ninth Circuit has mistakenly adopted, under the guise of *Block*, the principle that the Secretary of the Interior may usurp Congress' exclusive constitutional authority to dispose of public land in regard to the creation of Indian lands and disregard the specific limitations Congress placed on the Secretary in the Allotment Act. *Block* plainly does not sanction such limitless discretion on the part of the Secretary.

Respondents argue (Opp. at 11, 12) that Alaska's position departs from what it argued in *State of Idaho v. Coeur d'Alene Tribe of Idaho, cert. granted*, 116 S.Ct. 1415 (1996) (No. 94-1474). Alaska's positions in *Foster* and *Idaho* are consistent. Alaska's position in *Idaho* does not equate an officer's suit to an action asserting *ultra vires* conduct of the Secretary. Alaska did not argue that *Block* precludes judicial review of Secretarial action which is unconstitutional and statutorily prohibited. *See* 94-1474, States of California, Alabama, Alaska, *et al.*, Amici Br. at 7-16. *Idaho* does not concern the *ultra vires* exception to sovereign immunity where jurisdiction is premised on the unconstitutional and statutorily prohibited action of the Secretary.

Respondents concede (Opp. at 12) that Alaska distinguishes the *ultra vires* exception from the officer's suit theory described in *Block*. Alaska has explained this distinction in detail. Pet. at 11-12. Moreover, it is a distinction recognized in Indian land cases by the Eighth and Eleventh Circuits and, until *Foster*, by the Ninth Circuit as well.

Respondents do not refute that *Block* did not involve a constitutional claim. Respondents ignore this Court's recognition that the QTA must be interpreted in a fashion comporting with constitutional strictures. *Block*, 461 U.S. at 286 n.23. The respondents' argument fails to respond to the holdings of this Court in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) and *Webster v. Doe*, 486 U.S. 592 (1988). In *Bowen*, this Court affirmed that there is a strong presumption of judicial review of all agency actions. 476 U.S. at 672. In *Webster*, this Court held that review of constitutional claims can be precluded only where Congress clearly evidences such an intent. 486 U.S. at 603. Respondents offer no evidence that Congress intended the QTA's Indian land exception to preclude review of constitutional claims related to the creation of Indian land.

a. Alaska's constitutional claim.

Relying on *Dalton v. Specter*, 114 S.Ct. 1719 (1994) the respondents argue that Alaska's claim against the Secretary does not give rise to a constitutional claim. Unlike the separation of powers claim in *Dalton*, Alaska in this case alleges that the Secretary violated the Property Clause of the Constitution in approving Foster's allotment. The Supreme Court interprets the Property Clause as granting exclusive authority to Congress to dispose of public lands. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917). Congress acts through legislation. The Property Clause prohibits both the courts and the executive agencies of government from disposing of public lands contrary to an Act of Congress. *United States v. State of California*, 332 U.S. 19, 27 (1947). Thus, where an

executive agency disposes of public land in a manner which violates the congressional limitations on that agency's disposal authority, it violates not only the statute which contains those limitations but the Property Clause as well. In *Foster*, the Ninth Circuit has now interpreted *Block* to shield from judicial scrutiny claims based on the Secretary's usurpation of authority that is vested exclusively with the Congress. Under *Webster*, review of such claims may only be precluded where Congress clearly intends that there be no review. Neither the Ninth Circuit in *Foster* nor the respondents point to a clear intent by Congress to preclude constitutional claims. Indeed, as pointed out above, this court in *Block* has already held that the QTA must comport with constitutional strictures. 461 U.S. at 286 n.23.

The Secretary's approval of Foster's allotment gave appropriated mineral land to an Alaska Native even though Congress declared that Alaska Natives could only be allotted unappropriated non-mineral lands. The Secretary may not agree that Alaska Natives should be limited to a specific category of land when seeking allotments. However, the exclusive authority granted to Congress under the Property Clause precludes the Secretary and the courts from substituting their judgment for the judgment of Congress "in this congressional area of national power." *California*, 332 U.S. at 27. Nothing in *Dalton* supports the conclusion that the courts are without jurisdiction to review decisions of government officials where, as here, those decisions violate a specific constitutional limitation on executive authority. In fact, *Dalton* recognized that the courts have jurisdiction to review constitutional challenges to executive decisions. 114 S.Ct at 1724.

b. The Secretary's limited authority.

This case is not a mere disagreement over the interpretation of the Allotment Act, as the government suggests. Opp. at 15. Congress mandated that lands necessary for highways and material sources were to be "appropriated and transferred" to the states. 23 U.S.C. § 317. Congress also mandated that appropriated lands could not be allotted to Native Alaskans. 43 U.S.C. § 270-1. The Secretary of the Interior flaunted an express limitation on his disposal authority with regard to appropriated lands when he allotted lands that had already been appropriated to Alaska, and then acted to cancel Alaska's right-of-way based upon his *ultra vires* approval of Foster's allotment.

It makes no difference, as the government argues (Opp. at 17), that BLM appropriated and transferred to Alaska an easement rather than a fee interest in the disputed property. The authority cited by respondents either does not concern the Allotment Act, 43 U.S.C. § 270-1, or does not concern the Highway Act, 23 U.S.C. § 317. The Allotment Act does not differentiate between different types of interests. The Act differentiates between lands that are appropriated and those lands which are not appropriated. Lands that are appropriated before Native occupancy commences are unavailable for allotment. There is no dispute in this case that Alaska's right-of-way was appropriated long before Foster initiated her occupancy.[2]

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[2] The respondents argue extensively (Opp. at 18) that the disputed land is not mineral land. Although Alaska maintains its position in this regard, it is unimportant, for purposes of

II. The Ninth Circuit's interpretation of *Block* creates a conflict between circuits.

Respondents argue (Opp. at 13) that there is no conflict between the circuits on the availability of the *ultra vires* exception to sovereign immunity where Indian land is involved. The respondents' attempt to distinguish *Florida*[3] and *South Dakota*[4] is unconvincing. The Ninth Circuit's decision in *Foster* is in direct conflict with these decisions.

In *South Dakota* the Eighth Circuit struck down an agency decision creating Indian land on the basis that the statute under which the Secretary acted was unconstitutional. The court rejected the ruling of the district court that it was without jurisdiction to review the decision under the QTA. 69 F.3d at 881 n.1. *South Dakota* represents a classic application of the *ultra vires* exception to review a Secretarial decision to create Indian land. As the Ninth Circuit had previously affirmed in *Albert*, the *ultra vires* exception applies to agency action that is beyond the scope of the agency's limited power or where the agency

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jurisdiction, whether the disputed property is mineral land. The Allotment Act prohibits Native allotments on either appropriated land or mineral land. *Frank Sanford*, 119 IBLA 147 (1991). Since it is undisputed that the land was appropriated to Alaska before Foster began using it, the state needs to prove nothing more in order to establish Interior's decision as both statutorily prohibited and unconstitutional.

[3] *Florida v. U.S. Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

[4] *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), petition for cert. pending, No. 95-1956.

acts unconstitutionally or pursuant to an unconstitutional statute. 38 F.3d at 1076.[5]

The respondents seek to limit the application of *South Dakota* by arguing that the court exercised jurisdiction only in the constitutional context. However, Alaska has already demonstrated above that it has asserted a constitutional challenge to the Secretary's actions in this case. Thus, *Foster* may not be distinguished from *South Dakota* on this basis.

The Eleventh Circuit affirms that courts have jurisdiction to review agency decisions creating Indian land if those decisions are alleged to be unconstitutional or beyond the agency's statutory authority. *Florida*, 768 F.2d 1248, 1251-52. The respondents argue (Opp. at 13) that *Florida* does not address *Block's* unambiguous holding regarding the exclusive remedy of the QTA and should therefore be ignored by this Court. The respondents are wrong. The court in *Florida* recognized and applied *Block*. 768 F.2d at 1254-55. However, at the end of its discussion of *Block*, the Eleventh Circuit stated that the case before it was distinguishable from those situations where "the Secretary acted unconstitutionally or beyond his statutory authority when the United States acquired title to the land." 768 F.2d 1255 n.9. Until recently, the Ninth Circuit agreed with this statement. *Albert*, 38 F.3d 1068, 1076 (9th

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[5] The Ninth Circuit's first opinion in *Foster* was consistent with *Albert* and *South Dakota* in finding the *ultra vires* exception available as a jurisdictional base in the context of alleged unconstitutional action. *Foster*, 67 F.3d 864, 867 n.3 (9th Cir. 1995) (Allegedly unconstitutional actions subject the sovereign "to a *per se* divestiture of immunity.").

Cir. 1994); *Lee v. United States*, 809 F.2d 1406, 1409 n.2 (9th Cir. 1987); *Donnelly v. United States*, 850 F.2d 1313, 1317-18 (9th Cir. 1988).[6]

Even without a conflict among the circuits, this case raises an issue of national importance concerning the continuing vitality of the *ultra vires* exception to provide a jurisdictional basis for the review of unconstitutional or statutorily unauthorized agency action in creating Indian trust land. This issue is not unique to Alaska but affects all States as is evident from the decisions cited above.

III. Administrative finality is inapposite to the jurisdiction of the court.

The respondents' argument (Opp. at 16-19) concerning administrative finality is not addressed to the question before this Court, to wit: whether a federal district court has jurisdiction to review an agency decision creating Indian land at the time that decision is first applied against a specific property interest. Whether administrative finality should be applied in this case is properly considered only after the court exercises its subject-matter jurisdiction.

The respondents' argument (Opp. 16-19) that Alaska failed to timely raise its objections to the Foster allotment

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[6] *Cert. denied sub nom. Donnelly v. Eklutna, Inc.*, 488 U.S. 1046 (1989). The respondents decline to explain their disagreement with Alaska's characterization of *Lee* and *Donnelly*, preferring instead to rely on the hope that this Court will refuse to review an intra-circuit conflict. However, the *Foster* decision is in conflict with two other circuits, as is demonstrated above.

disregards the Ninth Circuit's holding in *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991). Under *Wind River*, Alaska had six years to challenge the approval of the Foster allotment measured from 1993, the date the allotment approval was first applied to cancel Alaska's right-of-way for the Parks Highway. Alaska's challenge was filed within six months of that final agency action. Therefore, even if properly before the Court on this petition, administrative finality is inapplicable.

The respondents also claim that Alaska waived its constitutional and statutory authority arguments by failing to raise them before the agency or the district court. Alaska has not waived these arguments. They are fairly subsumed in Alaska's claim that the QTA Indian land exception does not deprive the courts of jurisdiction where the Secretary acts *ultra vires*. Moreover, the issue before this Court is one of subject-matter jurisdiction. Jurisdictional and constitutional issues may be considered at any time, even if not explicitly raised. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1361 n.14 (9th Cir. 1978), *rev'd sub nom. on other grounds, Lake Country Estates Inc., v. Tahoe Regional Planning Agency*, 443 U.S. 391 (1979); *Turner v. McMahon*, 830 F.2d 1003, 1008 (9th Cir. 1987), *cert. denied*, 488 U.S. 818 (1988).

CONCLUSION

Alaska's petition for a writ of certiorari should be granted.

Respectfully submitted,

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